No. 15-1031

Title:	John Howell, Petitioner v. Sandra Howell
Docketed:	February 16, 2016
Lower Ct:	Supreme Court of Arizona
Case Nos.:	(CV-15-0030-PR)
Decision Date:	December 2, 2015

Questions Presented

~~Date~~~	~~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~
Feb 16 2016	Petition for a writ of certiorari filed. (Response due March 17, 2016)
Mar 11 2016	Brief of respondent Sandra Howell in opposition filed.
Mar 28 2016	Reply of petitioner John Howell filed.
Mar 30 2016	DISTRIBUTED for Conference of April 15, 2016.
Apr 18 2016	The Solicitor General is invited to file a brief in this case expressing the views of the United States.
Oct 17 2016	Brief amicus curiae of United States filed.
Nov 1 2016	Supplemental brief of petitioner John Howell filed.
Nov 2 2016	DISTRIBUTED for Conference of November 22, 2016.
Nov 28 2016	DISTRIBUTED for Conference of December 2, 2016.
Dec 2 2016	Petition GRANTED.
Dec 22 2016	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for petitioner.
Dec 22 2016	Motion to dispense with printing the joint appendix filed by petitioner John Howell.
Dec 29 2016	Consent to the filing of amicus curiae briefs in support of either party or of neither party received from counsel for respondent.
Jan 9 2017	Motion to dispense with printing the joint appendix filed by petitioner GRANTED.
Jan 17 2017	Brief of petitioner John Howell filed.
Jan 24 2017	Brief amici curiae of Veterans of Foreign Wars, and Operation Firing for Effect filed.
Feb 3 2017	SET FOR ARGUMENT on Monday, March 20, 2017
Feb 3 2017	Record requested from the Supreme Court of Arizona.
Feb 16 2017	Brief of respondent Sandra Howell filed.
Feb 21 2017	Record received from the Supreme Court of Arizona. The record is electronic.
Feb 22 2017	CIRCULATED.
Feb 23 2017	Brief amicus curiae of United States filed. (Distributed)
Feb 23 2017	Motion of the Acting Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
Mar 6 2017	Motion of the Acting Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
Mar 13 2017	Reply of petitioner John Howell filed. (Distributed)

Mar 20 2017	Argued. For petitioner: Adam G. Unikowsky, Washington, D. C. For respondent: Charles W. Wirken, Phoenix, Ariz.; and Ilana H. Eisenstein, Assistant to the Solicitor General, Department of Justice, Washington, D. C. (for United States, as amicus curiae.)
May 15 2017	Judgment REVERSED and case REMANDED. Breyer, J., delivered the opinion of the Court, in which Roberts, C. J., and Kennedy, Ginsburg, Alito, Sotomayor, and Kagan, JJ., joined. Thomas, J., filed an opinion concurring in part and concurring in the judgment. Gorsuch, J., took no part in the consideration or decision of the case.
Jun 19 2017	JUDGMENT ISSUED.
Jun 19 2017	MANDATE ISSUED

~~Name~~~~~~~~~~~~~~~~~~~~~~	~~~~~~~Address~~~~~~~~~~~~~~~~~~~	~~Phone~~~
Attorneys for Petitioner:		
Adam G. Unikowsky Counsel of Record	Jenner & Block, LLP 1099 New York Avenue, NW, Suite 900 Washington, DC 20001-4412 aunikowsky@jenner.com	(202) 639-6000
Party name: John Howell		
Attorneys for Respondent:		
Charles W. Wirken Counsel of Record	Gust Rosenfeld PLC One E. Washington Suite 1600 Phoenix, AZ 85004-2553 cwirken@gustlaw.com	(602) 257-7959
Party name: Sandra Howell		
Other:		
Ilana Hope Eisenstein	950 Pennsylvania Ave., N.W. Washington, DC 20530 SupremeCtBriefs@USDOJ.gov	(202) 307-3933
Party name: United States		
Carson J. Tucker	Law Offices of Carson J. Tucker 117 N. First Street, Suite 111 Ann Arbor, MI 48104 cjtucker@lexfori.org	(734) 629-5870
Party name: Veterans of Foreign Wars, and Operation Firing for Effect		
Jeffrey B. Wall	Acting Solicitor General United States Department of Justice 950 Pennsylvania Avenue, N.W. Washington, DC 20530-0001 SupremeCtBriefs@USDOJ.gov	(202) 514-2217
Party name: United States		

RECORD AND BRIEFS

15-1031

No. ____

Supreme Court, U.S.
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IN THE
Supreme Court of the United States

JOHN HOWELL,
Petitioner,

v.

SANDRA HOWELL,
Respondent.

On Petition for a Writ of Certiorari
to the Arizona Supreme Court

PETITION FOR A WRIT OF CERTIORARI

KEITH BERKSHIRE
BERKSHIRE LAW OFFICE
5050 N. 40th St.,
Suite 340
Phoenix, AZ 85018
(602) 396-7669

ADAM G. UNIKOWSKY
Counsel of Record
BENJAMIN M. EIDELSON*
JENNER & BLOCK LLP
1099 New York Ave., NW
Suite 900
Washington, DC 20001
(202) 639-6000
aunikowsky@jenner.com

*Not admitted in D.C.;
supervised by principals of the
Firm.

QUESTION PRESENTED

Whether the Uniformed Services Former Spouses' Protection Act preempts a state court's order directing a veteran to indemnify a former spouse for a reduction in the former spouse's portion of the veteran's military retirement pay, where that reduction results from the veteran's post-divorce waiver of retirement pay in order to receive compensation for a service-connected disability.

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PETITION FOR WRIT OF CERTIORARI

John Howell petitions for a writ of certiorari to review the judgment of the Arizona Supreme Court.

OPINIONS BELOW

The decision of the Arizona Supreme Court (Pet. App. 1a) is reported at 361 P.3d 936. The decision of the Arizona Court of Appeals (Pet. App. 15a) is unreported but is available at 2014 WL 7236856. The decision of the Arizona Superior Court (Pet. App. 23a) is unreported.

JURISDICTION

The judgment of the Arizona Supreme Court was entered on December 2, 2015. This Court has jurisdiction under 28 U.S.C. § 1257.

STATUTES INVOLVED

The Uniformed Services Former Spouses' Protection Act, Pub. L. No. 97-252, tit. X, 96 Stat. 730 (1982), is codified at 10 U.S.C. § 1408. 10 U.S.C. § 1408(c)(1) provides:

> Subject to the limitations of this section, a court may treat disposable retired pay payable to a member for pay periods beginning after June 25, 1981, either as property solely of the member or as property of the member and his spouse in accordance with the law of the jurisdiction of such court.

10 U.S.C. § 1408(a)(4) provides, in pertinent part:

> The term "disposable retired pay" means the total monthly retired pay to which a member is entitled less amounts which–
>
> . . .
>
> (B) are deducted from the retired pay of such member as a result of forfeitures of retired pay ordered by a court-marital or as a result of a waiver of retired pay required by law in order to receive compensation under title 5 or title 38;
>
> . . .

38 U.S.C. § 5304(a)(1) provides, in pertinent part:

> Except . . . to the extent that retirement pay is waived under other provisions of law, not more than one award of pension, compensation, emergency officers', regular, or reserve retirement pay . . . shall be made concurrently to any person based on such person's own service . . . .

38 U.S.C. § 5305 provides, in pertinent part:

> . . . [A]ny person who is receiving pay pursuant to any provision of law providing retired or retirement pay to persons in the Armed Forces, . . . and who would be eligible to receive pension or compensation under the laws administered by the Secretary [of Veterans Affairs] if such person were not receiving such retired or retirement pay, shall be entitled to receive such pension or compensation upon the filing by such person with the department by which such

retired or retirement pay is paid of a waiver of so much of such person's retired or retirement pay as is equal in amount to such pension or compensation.

STATEMENT OF THE CASE

This case concerns the proper treatment in divorce of a veteran's military retirement pay when the veteran also suffers from a service-connected disability. In many cases, disabled veterans are eligible for disability pay or retirement pay, but not both; thus, when a veteran elects to take disability pay, he must waive a portion of his retirement pay. As this Court has previously held, the Uniformed Services Former Spouses' Protection Act (USFSPA), 10 U.S.C. § 1408, permits the division of retirement pay, but prohibits the division of disability pay, in divorce proceedings. *Mansell v. Mansell*, 490 U.S. 581 (1989).

In the decision below, Petitioner's disability arose *after* a divorce judgment had already divided his military retirement pay between Petitioner and Respondent, his former spouse. After Petitioner elected to take disability pay and waived a portion of his military retirement pay, the divorce court issued an order requiring Petitioner to indemnify Respondent for the reduction in her share of Petitioner's military retirement pay that resulted from his post-divorce election of disability compensation. The Arizona Supreme Court upheld the divorce court's order, finding that the modification of the decree did not conflict with the USFSPA. Four other state supreme courts have adopted the same interpretation of the USFSPA, but five have squarely rejected it, holding that such orders are preempted by the USFSPA. That entrenched and well-recognized division of authority with respect to a recurring question of federal law warrants this Court's review.

A. Statutory Framework

The Federal Government provides a pension for members of the Armed Forces who retire after serving for a minimum period (generally twenty years). *Mansell*, 490 U.S. at 583; *see, e.g.*, 10 U.S.C. § 8911(a) (Air Force). This pension is known as Military Retirement Pay ("MRP"). In addition, veterans who suffer from service-connected disabilities are entitled to compensation. *See* 38 U.S.C. §§ 1110, 1131. The amount of compensation for a given disability is based on a scale that reflects "the average impairments of earning capacity resulting from such injuries in civil occupations." *Id.* § 1155.

In order to receive disability compensation, veterans who are entitled to MRP generally must waive an equivalent portion of their MRP. *See* 38 U.S.C. §§ 5304(a)(1), 5305.[1] Veterans in that position often elect to receive disability compensation because, unlike MRP, disability compensation is exempt from federal, state, and local taxation. *See Mansell*, 490 U.S. at 583-84.

In *McCarty v. McCarty*, 453 U.S. 210 (1981), this Court held that federal law did not permit states to treat MRP as divisible property in divorce proceedings. As the Court explained, Congress conferred MRP as a "personal entitlement" of service members, and state

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[1] A veteran whose disability is rated as at least 50 percent disabling is permitted to receive overlapping disability compensation and MRP. 10 U.S.C. § 1414(a). Because Petitioner is 20 percent disabled, that provision does not apply in this case. Pet. App. 3a.

courts were therefore barred from awarding an interest in a veteran's MRP to a former spouse in a divorce. *Id.* at 232. The Court noted that Congress was free to afford greater protection to former spouses if it so chose. *Id.* at 235-36.

Congress responded by passing the Uniformed Services Former Spouses' Protection Act (USFSPA), Pub. L. No. 97-252, tit. X, 96 Stat. 730 (1982) (codified at 10 U.S.C. § 1408). The USFSPA overrode *McCarty* in part: it authorized state courts to treat MRP as divisible property, but it excluded from this authority, inter alia, any portion of MRP that is waived in order to obtain disability compensation. Specifically, as relevant here, the Act provides that "a court may treat *disposable retired pay* payable to a member . . . either as property solely of the member or as property of the member and his spouse," 10 U.S.C. § 1408(c)(1) (emphasis added), and it defines "disposable retired pay" to exclude "amounts which . . . are deducted from the retired pay of such member . . . as a result of a waiver of retired pay required by law in order to receive [disability] compensation," *id.* § 1408(a)(4).

In *Mansell v. Mansell*, this Court confirmed that the USFSPA "does not grant state courts the power to treat as property divisible upon divorce military retirement pay that has been waived to receive veterans' disability benefits." 490 U.S. at 594-95. Mr. Mansell was a military retiree who had waived a portion of his MRP in favor of disability compensation. When Mr. Mansell and Mrs. Mansell divorced, they entered into a property settlement that obligated Mr. Mansell to pay Mrs. Mansell "50 percent of his total

military retirement pay, including that portion of retirement pay waived so that [Mr.] Mansell could receive disability benefits." *Id.* at 586. Mr. Mansell later petitioned the state courts to modify the divorce decree to remove this provision, but they refused to do so. This Court reversed. As the Court explained, the USFSPA did not disturb the prior federal rule of non-divisibility with respect to the portion of MRP that a military retiree waives in favor of disability compensation. *Id.* at 592-94.

B. Proceedings Below

Petitioner John Howell and Respondent Sandra Howell divorced in 1991. The dissolution decree issued by the Arizona Superior Court provides that "[Respondent] is entitled to and is awarded as her sole and separate property FIFTY PERCENT (50%) of [Petitioner]'s military retirement when it begins through a direct pay order." Pet. App. 41a.[2] Petitioner retired from the Air Force in 1992 after a twenty-year career, and the parties began receiving MRP shortly thereafter. *Id.* at 2a-3a.

In 2005, the Department of Veterans Affairs (VA) determined that Petitioner suffers from degenerative joint disease in his shoulder and that this impairment qualifies as a service-connected disability. The VA estimated that Petitioner's disability reduces his earning capacity by twenty percent. *Id.* at 3a; *see* 38

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[2] A "direct pay order" authorizes the Federal Government to make payments directly to a former spouse who has been awarded a portion of a veteran's MRP. *See* 10 U.S.C. § 1408(d); *Mansell*, 490 U.S. at 585.

U.S.C. § 1155 (explaining disability-rating system). Accordingly, he qualifies for monthly payments of tax-exempt disability compensation to replace his lost earnings. Pet. App. 3a. In order to obtain this compensation, Petitioner was required to waive an equal portion of his MRP. *See* 38 U.S.C. § 5304(a)(1). He therefore executed such a waiver, effective from July 2004. Pet. App. 3a. As a consequence, the MRP payments to both Petitioner and Respondent declined.

In 2013, Respondent brought an action to "enforce" the provision of the divorce decree regarding MRP, arguing that it entitled her to half of the full value of the MRP for which Petitioner is eligible (notwithstanding any waiver on his part). *Id.* at 3a-4a. The Arizona Superior Court agreed and ordered Petitioner to "ensur[e] [Respondent] receive[s] her full 50% of the military retirement without regard for the disability." *Id.* at 28a. The Arizona Court of Appeals affirmed. *Id.* at 21a.

In the Arizona Supreme Court, Petitioner argued that the USFSPA, as construed in *Mansell*, denies state courts the authority to award a former spouse an interest in the waived portion of a veteran's MRP. *Id.* at 5a.[3] The Supreme Court acknowledged that *Mansell* barred state courts from "dividing MRP that has been waived to receive federal disability benefits." *Id.* at 6a (citing *Mansell*, 490 U.S. at 589). But, the court

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[3] Although Petitioner had not raised this argument in the Superior Court, the Supreme Court exercised its discretion to decide the federal question on the merits, explaining that the issue was "of public importance" and "likely to recur." Pet. App. 5a.

explained, this case presents the distinct question "how the family court should proceed when a veteran elects a VA waiver to receive disability benefits *after* entry of a dissolution decree, thereby reducing the ex-spouse's share of previously awarded MRP." *Id.* The court noted that "[c]ourts in other jurisdictions have divided on the issue." *Id.* It concluded that although "the family court cannot divide MRP that has been waived to obtain disability benefits at the time of the decree or thereafter," the court was free to order Petitioner to *indemnify* Respondent for the reduction in her share of MRP. *Id.* at 7a. As the court explained:

> The 2014 Order did not divide the MRP subject to the VA waiver, order [Petitioner] to rescind the waiver, or direct him to pay any amount to [Respondent] from his disability pay. Under these circumstances, the family court did not violate the USFSPA or *Mansell* because it did not treat the MRP subject to the VA waiver as divisible property. . . . Nothing in the USFSPA directly prohibits a state court from ordering a veteran who makes a post-decree VA waiver to reimburse the ex-spouse for reducing his or her share of MRP.

Id. at 7a-8a. The Arizona Supreme Court thus concluded that, because the family court had not awarded Respondent an interest in the disability compensation itself, but rather an equal sum to be satisfied by any of Petitioner's assets, *Mansell* and the USFSPA did not apply.

The court also rejected Petitioner's alternative arguments under state law. Pet. App. 8a-14a. The

court acknowledged that "[b]ecause the decree did not require John to indemnify Sandra for her loss of MRP, the 2014 Order necessarily modified the original property disposition terms." *Id.* at 10a. But it rejected Petitioner's argument that an Arizona statute barred such modifications, holding that the statute violated the Arizona Constitution. *Id.* at 11a-14a.

REASONS FOR GRANTING THE WRIT

I. The State Courts Are Squarely Divided On The Question Presented.

As the Arizona Supreme Court acknowledged below, and as many other courts have also noted, the question presented has sharply divided the state courts. In Maine, Tennessee, Massachusetts, Rhode Island, and now Arizona, a state court may require a veteran to indemnify a former spouse for the reduction in MRP brought about by a post-divorce disability waiver. In Vermont, Mississippi, Alabama, Alaska, and Nebraska, federal law is understood to prohibit such an order. These decisions are in direct conflict regarding the meaning of the USFSPA and of this Court's decision in *Mansell*. This Court should grant review to resolve that entrenched conflict regarding a recurring question of federal law.

A. The Supreme Courts Of Maine, Tennessee, Massachusetts, And Rhode Island, As Well As Arizona, Interpret The USFSPA To Permit Indemnification Orders.

In the decision below, the Arizona Supreme Court held that the USFSPA permits a family court to order a veteran to indemnify a former spouse for the reduction in MRP that results from the veteran's choice to receive disability compensation. Four other state supreme courts have reached the identical conclusion.

1. In *Black v. Black*, 842 A.2d 1280 (Me. 2004), the Supreme Judicial Court of Maine interpreted the USFSPA in the same manner as the decision below.

When David and Lorraine Black divorced in 1993, the divorce judgment provided that each would receive "fifty per cent (50%) of [David's] disposable [military] retirement pay." *Id.* at 1282. Seven years later, the VA increased David's disability rating, and David waived his retirement pay in order to obtain the increased disability compensation available to him. *Id.* In response, Lorraine moved to enforce the original judgment, or, alternatively, to modify it to vindicate her claim to compensation based on the amount of MRP that David had previously received.

The Supreme Judicial Court noted that "[s]ince *Mansell*, jurisdictions have divided on the question of whether the USFSPA limits the authority of state courts to grant relief when, as here, a postjudgment conversion of retirement pay to disability pay divests the share of retirement pay allocated to a former spouse in an earlier divorce judgment." *Id.* at 1284. The court reasoned that *Mansell* had only "explicitly addressed" the treatment "*upon* divorce" of MRP that had already, at the time of the divorce, been waived in favor of disability compensation. *Id.* at 1284-85 (emphasis in original; internal quotation marks omitted). It therefore concluded, in accord with the decision below, that "the USFSPA does not limit the authority of a state court to grant postjudgment relief when military retirement pay previously divided by a divorce judgment is converted to disability pay, so long as the relief awarded does not itself attempt to divide disability pay as marital property." *Id.* at 1285. The family court was therefore free to enter an "order that results in David paying to Lorraine some or all of the

amount she would have received directly from the United States Government absent David's conversion of his retirement pay to disability pay." *Id.*

2. The Supreme Court of Tennessee has reached the same conclusion on the same facts. *Johnson v. Johnson*, 37 S.W.3d 892 (Tenn. 2001). James and Willie Jean Johnson divorced in 1996. *Id.* at 894. At the time, James was an active-duty member of the Marine Corps. The marital dissolution agreement, incorporated into the divorce decree, provided that "[u]pon [James's] retirement, [Willie Jean] shall receive one-half of all military retirement benefits due [James]." *Id.* Both parties began to receive MRP when James retired. Thereafter, James waived a portion of his MRP in order to receive disability compensation, thereby reducing the MRP payments to both parties. *Id.* Willie Jean petitioned for a modification of the divorce decree to increase her payments by an equal amount, which the Supreme Court construed as a motion to enforce the original decree. *Id.* at 895-96.

The Supreme Court instructed the family court to grant Willie Jean's motion. It reasoned that Willie Jean had a "vested right" in the expected value of the MRP at the time of the divorce, which could not be "unilaterally diminished by an act of the military spouse." *Id.* at 897-98. The court held that *Mansell* posed no obstacle to this result because the divorce decree did not "divide Mr. Johnson's disability benefits in violation of *Mansell*." *Id.* at 898. As the court explained, its construction of the divorce decree would not require James to pay Willie Jean from his disability benefits (or from the waived portion of his MRP), but

would rather require him to pay her an amount equal to the MRP she would have received in the absence of his disability-based waiver. *Id.*

3. The Supreme Judicial Court of Massachusetts has confronted the same question and has adopted the same position. *Krapf v. Krapf*, 786 N.E.2d 318 (Mass. 2003). Albert and Constance Krapf divorced in 1985. *Id.* at 319. Under the terms of their separation agreement, which was incorporated in the divorce judgment, Albert committed to to "allocating half his pension rights with the U.S. Army to [Constance]." *Id.* Albert retired from the Army in 1994, and both Albert and Constance began receiving MRP payments. *Id.* at 320. In 1997, the VA determined that Albert suffered from post-traumatic stress disorder, and, in order to obtain disability compensation, he waived the majority of his MRP. *Id.* at 320-21. Constance then filed suit against Albert, arguing that he was obligated to restore her to the position she would have enjoyed in the absence of that waiver. *Id.* at 321.

The Supreme Judicial Court sided with Constance. The court reasoned that Albert had breached the settlement agreement "by converting his and [Constance's] military retirement benefits to VA disability benefits for his own benefit." *Id.* at 324. The court also concluded that *Mansell* and the USFSPA did not preclude an order requiring Albert to pay Constance the amount of MRP she would have received in the absence of a disability waiver. *Id.* at 326. The court acknowledged that *Mansell* "does not permit State courts 'to treat as property divisible upon divorce military retirement pay that has been waived to

receive veterans' disability benefits.'" *Id.* (quoting *Mansell*, 490 U.S. at 595). But it reasoned that "[t]he judgment in this case does not divide the defendant's VA disability benefits in contravention of the *Mansell* decision; the judgment merely enforce[s] the defendant's contractual obligation to his former wife, which he may satisfy from any of his resources." *Id.*

4. The Rhode Island Supreme Court has adopted the same rule as well. *Resare v. Resare*, 908 A.2d 1006 (R.I. 2006). When Ronald and Susan Resare divorced in 1986, the divorce decree incorporated a property settlement agreement, which provided that "[Susan] shall be entitled to receive as a property settlement, a sum equal to thirty-five (35%) percent of the gross pension of [Ronald]." *Id.* at 1007-08 & n.2. Both parties then received MRP payments directly from the government. *Id.* at 1008. In 1997, Ronald began to receive disability compensation from the VA, and the MRP payments to both Ronald an Susan were reduced as a result. *Id.* Susan filed suit to enforce the terms of the decree, which, she argued, entitled her to 35% of the *total* pension Ronald would have received if he had not obtained disability compensation. *Id.*

The Supreme Court accepted that argument. It first interpreted the divorce decree to provide that Susan was entitled to 35% of the MRP for which Ronald would have been eligible in the absence of a disability waiver. *Id.* at 1009-10. It then explained that *Mansell* and the USFSPA did not foreclose this interpretation, or the ensuing order that Ronald pay Constance what she would have received in the absence of disability compensation. Specifically, the court

explained that, "[i]n *Mansell*, the property settlement agreement sought to divide the husband's disability benefits that he was receiving at the time of the divorce," but "[t]hat is not what happened here." *Id.* Rather than "divid[ing] Ronald's disability benefit in contravention of *Mansell*," the order that Constance sought would simply enforce the division of property contemplated by the original agreement, when Ronald was not receiving disability compensation at all. *Id.* at 1010.

The highest courts of Maine, Tennessee, Massachusetts, and Rhode Island, as well as Arizona, are thus in agreement. Each has held that when a veteran waives MRP in favor of disability compensation *after* a divorce, the court may order the veteran to offset the reduction in the former spouse's MRP. Such indemnity orders are not precluded by *Mansell* or the USFSPA, according to this view, because they do not divide *disability benefits* (or, equivalently, the waived portion of MRP), but permit the veteran to satisfy this obligation out of any of his or her assets.

B. The Supreme Courts Of Vermont, Mississippi, Alabama, Alaska, And Nebraska Interpret The USFSPA To Prohibit Indemnification Orders.

Five other state supreme courts have interpreted *Mansell* and the USFSPA to prohibit the same orders that the decisions described above understood them to permit.

1. The Vermont Supreme Court has squarely broken with the decisions recounted above by holding that, under federal law, a state court may *not* require a veteran to indemnify a former spouse for the reduction in MRP effected by a post-divorce disability waiver. *Youngbluth v. Youngbluth*, 6 A.3d 677 (Vt. 2010). Bruce and Elisabeth Youngbluth divorced in 2005, shortly after Bruce retired from the Marine Corps. The divorce decree awarded Elisabeth "19.81% of [Bruce's] monthly retirement benefits." *Id.* at 679. Shortly thereafter, the VA rated Bruce as 30% disabled, and he therefore waived a portion of his MRP, which was "replaced dollar-for-dollar" by disability compensation. *Id.* The MRP payments to both Bruce and Elisabeth decreased accordingly. Elisabeth then petitioned the family court to increase her percentage share of the MRP to cancel out the reduction in its total size, and the court did so. *Id.* at 679-80.

The Vermont Supreme Court reversed, holding that federal law barred the family court from increasing Elisabeth's share of the MRP to compensate for Bruce's disability-based waiver. The court first surveyed the extensive body of case law dealing with this question and concluded that "[s]tate courts are split on this issue," with "no clear majority viewpoint." *Id.* at 684, 687. It then specifically declined to "join[] those courts that have found 'creative solutions' around *Mansell*." *Id.* at 684 (quoting *In re Smith*, 56 Cal. Rptr. 3d 341, 345 (Cal. App. 2007)). Among the decisions that the Vermont Supreme Court rejected as unpersuasive was *In re Marriage of Gaddis*, 957 P.2d 1010 (Ariz. Ct. App. 1997), which the Arizona Supreme Court adopted

in the decision below. *Compare Youngbluth*, 6 A.3d at 686-87 (noting that *Gaddis*, and other out-of-state opinions, "directly support wife in the appeal before this Court"), *with* Pet. App. 6a (adopting *Gaddis*'s reasoning).

In rejecting that line of authority, the Vermont Supreme Court observed that "a decision by the United States Supreme Court on a matter of federal law is binding upon the state courts." *Youngbluth*, 6 A.3d at 685 (internal quotation marks omitted). The court then held that *Mansell* squarely foreclosed the divorce court's order, reasoning that "[b]y raising [Elisabeth's] percentage of [Bruce's] disposable retirement benefits, the trial court was clearly offsetting the effect that [Bruce's] receipt of disability benefits had on the payments due to [Elisabeth]." *Id.* at 688-89. That "represented an attempt to attach funds that federal law does not allow the trial court to distribute as property in a divorce proceeding." *Id.* at 688. The court therefore reversed the family court's order and reinstated the terms of the original decree.[4]

2. The Mississippi Supreme Court has taken the same side of the split. *Mallard v. Burkart*, 95 So. 3d

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[4] Justice Johnson concurred and noted her agreement that the family court's modification to the original decree amounted to "an end-around to the Supreme Court's holding in *Mansell*." *Youngbluth*, 6 A.3d at 692 (Johnson, J., concurring). She wrote separately to emphasize that when a divorce decree is based on fraudulent representations by a veteran regarding his or her plans to seek disability compensation, the court remains free to grant relief from the original decree under the state analogue of Rule 60(b) of the Federal Rules of Civil Procedure. *Id.* at 691-95.

1264 (Miss. 2012). Tonya Burkart and James Mallard divorced in 2001. *Id.* at 1267. At the time, Mallard was an active-duty member of the Air Force. The divorce judgment incorporated a property settlement agreement, which provided that "[Burkart] is awarded 40% of [Mallard's] disposable military retired pay." *Id.* In 2002, Mallard retired and began sending Burkart forty percent of his monthly MRP income. In 2003, the VA determined that Mallard was entitled to disability compensation; he waived a portion of MRP in order to obtain that compensation; and he decreased his monthly payments to Burkart as a result. *Id.* Burkart petitioned for modification of the divorce judgment, asserting "that Mallard had structured his retirement from the Air Force in such a way as to defeat her forty-percent interest in the retirement pay." *Id.* The family court agreed, holding Mallard liable for "the difference between what Burkart would have received had Mallard not gone on disability and what she actually had received." *Id.* at 1268.

On appeal, the Mississippi Supreme Court first noted that "[s]everal other states have addressed whether state trial courts have any authority to distribute disability benefits, where the military spouse goes on disability after the divorce property settlement is finalized," and that "[t]here is a split of authority on this question, and no clear majority view." *Id.* at 1271. Whereas the family court had relied on the Tennessee Supreme Court's analysis in *Johnson*, *see supra* pp. 13-14, the Mississippi Supreme Court adopted the reasoning advanced by the Vermont Supreme Court in *Youngbluth*. *Id.* at 1272. As the court explained,

"[w]hatever the equities may be, state law is preempted by federal law, and thus, state courts are precluded from ordering distribution of military disability benefits contrary to federal law." *Id.* The court found "the holding of *Mansell* to be both specific and clear," and, like the Vermont Supreme Court, declined to follow other state courts that had "established 'creative solutions' around the literal meaning of the *Mansell* holding." *Id.* (quoting *In re Smith*, 56 Cal. Rptr. 3d at 345). The court concluded that the USFSPA, as construed in *Mansell*, has the unavoidable consequence that payments to a former spouse could be reduced "simply because [the military spouse] elects to increase his after-tax income by converting a portion of that pay into disability benefits." *Id.* (quoting *Mansell*, 490 U.S. at 595 (O'Connor, J., dissenting); alteration in original). The court therefore reversed the family court's order holding Mallard liable for "the difference between what Burkart would have received had Mallard not gone on disability and what she actually received." *Id.* at 1273.

3. The Alabama Supreme Court has adopted the same interpretation of federal law in the same circumstances. *Ex parte Billeck*, 777 So. 2d 105 (Ala. 2000). When Edwin and Hellene Billeck divorced in 1989, the divorce judgment incorporated a settlement agreement providing that "[Edwin] agrees to pay to [Hellene] his monthly U.S. Army retirement check." *Id.* at 106. Edwin, who was already retired and receiving MRP at the time of the divorce, began remitting his MRP income to Hellene. In 1998, he waived a portion of his MRP in favor of disability

compensation, and his payments to Hellene accordingly decreased. *Id.* at 107. Hellene then petitioned the family court to order Edwin to pay her both his MRP and his disability income, which together equated to the sum she had received prior to Edwin's waiver. The court entered such an order. *Id.*

The Alabama Supreme Court reversed. As the court explained, *Mansell* "specifically limits the state courts from treating veteran's disability benefits received in lieu of retirement pay as divisible community property." *Id.* at 108. Accordingly, "[w]hen a trial court makes an alimony award based upon its consideration of the amount of veteran's disability benefits, the trial court essentially is awarding the wife a portion of those veteran's disability benefits; and in doing so the trial court is violating federal law." *Id.* at 109. The court therefore ruled that the family court could not order Edwin to remit his disability compensation to Hellene or to pay her an equal sum. *Id.*[5]

4. In *Clauson v. Clauson*, 831 P.2d 1257 (Alaska 1992), the Alaska Supreme Court took the same position, vacating a family court's order that would have required a veteran to indemnify a former spouse for the reduction in her share of MRP that resulted from his election of disability compensation. Dorothy and James Clauson divorced in 1984. *Id.* at 1259. At that time, James was a military retiree receiving MRP.

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[5] The court specifically rejected contrary decisions of several state appellate courts, including those in Florida, Arkansas, and Vermont. *Billeck*, 777 So. 2d at 108.

The parties entered into a property settlement that entitled Dorothy to "13/40 of [James's] current military pension and increases therein." *Id.* Four years later, in 1990, James waived his MRP in favor of disability compensation. *Id.* Dorothy then filed a motion to modify the divorce decree, and the family court entered an order requiring James to pay Dorothy, on a monthly basis, the sum that she had been receiving in MRP prior to his waiver. *Id.* at 1259-60.

The Alaska Supreme Court vacated that order. It first explained that *Mansell* "unequivocal[ly]" bars state courts from "equitably divid[ing] veterans' disability benefits received in place of waived retirement pay." *Id.* at 1262. It noted that this prohibition does not mean that courts must "completely ignore the economic consequences of a military retiree's decision to waive retirement pay in order to collect disability pay." *Id.* at 1263. Rather, a court may "consider a party's military disability benefits as they affect the financial circumstances of both parties" in determining an equitable overall asset distribution. *Id.* at 1264. But the court noted the "risk" that this limited authorization "might lead trial courts to simply shift an amount of property equivalent to the waived retirement pay from the military spouse's side of the ledger to the other spouse's side," emphasizing that "[t]his is unacceptable." *Id.* Under *Mansell*, "[d]isability benefits should not, either in form or substance, be treated as marital property subject to division upon the dissolution of marriage." *Id.*

The court concluded that that was "precisely what happened in the case" at hand, because the court had

exactly replaced Dorothy's MRP income with a new obligation of support imposed on James. *Id.* Accordingly, the order sought to "regain the status quo as if the *Mansell* decision did not exist," and its "effect . . . was to divide retirement benefits that have been waived to receive disability benefits in direct contravention of the holding in *Mansell*." *Id.* The order approved by the Arizona Supreme Court in the decision below is materially identical to the order at issue in *Clauson*—Petitioner was ordered to exactly replace the lost MRP income to his former spouse—and therefore is unlawful under the Alaska Supreme Court's interpretation of federal law.

5. The Nebraska Supreme Court has taken the same position as well. *Kramer v. Kramer*, 567 N.W.2d 100 (Neb. 1997). Kathleen and Kenneth Kramer divorced in 1991. *Id.* at 103-04. At the time of the divorce, Kenneth had retired from the Air Force and was receiving MRP. The final divorce decree provided that "[Kathleen] is awarded 46% of [Kenneth's] military pension with the United States Air Force." *Id.* Kenneth therefore began making monthly payments to Kathleen. In 1994, the VA determined that Kenneth was eligible for disability compensation, and also made this benefit retroactive to his initial application in 1992. Kenneth waived a portion of his MRP in favor of disability compensation, and this waiver was also made retroactive to 1992. *Id.*

Both parties filed suit, and the Nebraska Supreme Court decided both actions together. First, Kenneth sought to recoup the portion of the MRP that he had been required to pay Kathleen before 1994 that was, by

operation of his later election of disability compensation, retroactively waived in favor of disability compensation. Second, Kathleen sought to modify the divorce decree to increase Kenneth's alimony obligation on the ground that the reduction in MRP effected a material change in the parties' relative economic circumstances.

As to the first claim, the court held that Kathleen was obligated to repay the relevant portion of the MRP she had previously received. As the court explained, "[t]o permit her to retain this overpayment would have the effect of awarding her a percentage of the husband's disability benefits, which is prohibited by [the USFSPA]." *Id.* at 110. In other words, once that money was converted from MRP to disability compensation (albeit retroactively), *Mansell* barred the divorce decree from ordering Kenneth to pay it to Kathleen, and Kathleen therefore lacked a legal claim to it. *Id.* at 109-10. This holding is in accord with the rule that post-divorce conversions to disability compensation remain subject to *Mansell*, and it squarely conflicts with the interpretation of *Mansell* adopted by the decision below.

As to the second claim, the court embraced both the rule and the reasoning of the Alaska Supreme Court in *Clauson*. Specifically, the court held that, in assessing the relative economic circumstances of the parties, a family court may consider (alongside all other relevant facts) the fact that Kenneth now receives disability compensation and Kathleen now receives diminished MRP payments. The court underscored, however, that its "holding does not permit the district court to treat

service-connected disability benefits as divisible marital property in form or substance." *Id.* at 113 (citing *Clauson*, 831 P.2d 1257). The court insisted that lower courts heed this "significant limitation" on their power to order "redistribution" in response to a post-divorce conversion to disability compensation. *Id.* at 111.

* * *

The supreme courts of Vermont, Mississippi, Alabama, Alaska, and Nebraska thus have all held that *Mansell* and the USFSPA bar court orders that seek to "make whole" a former spouse whose MRP income has been reduced as a consequence of a veteran's disability-based waiver. Each has specifically rejected the proposition—endorsed by the highest courts of Maine, Tennessee, Massachusetts, Rhode Island, and now Arizona—that when a veteran waives MRP in favor of disability compensation *after* a divorce, the court may order the veteran to offset the reduction in the former spouse's MRP.

As the courts on both sides of the split have recognized, this division is stark and entrenched. *See, e.g.*, Pet. App. 6a ("Courts in other jurisdictions have divided on the issue."); *Youngbluth*, 6 A.3d at 684 ("State courts are split on this issue."); *Mallard*, 95 So. 3d at 1271 ("There is a split of authority on this question, and no clear majority view."); *Black*, 842 A.2d at 1284 ("Since *Mansell*, jurisdictions have divided on the question of whether the USFSPA limits the authority of state courts to grant relief when, as here, a postjudgment conversion of retirement pay to disability pay divests the share of retirement pay

allocated to a former spouse in an earlier divorce judgment.").

Both sides can claim a number of intermediate appellate courts as adherents as well.[6] These decisions are also due significant weight in gauging the breadth and depth of the split in authority. Because most state supreme courts (unlike the federal courts of appeals) exercise discretionary review, there is no reason to assume that they will all decide this issue eventually. Rather, if the state supreme court is content with the rule put in place by an intermediate appellate court—which, at a minimum, suffices to impose uniformity within the state—it will often let that precedent stand. *See, e.g., In re Marriage of Pierce*, 982 P.2d 995, 998 (Kan. Ct. App.) (holding that a court "cannot order [a veteran] to pay his disability benefits to [his former spouse," and "the court may not do indirectly what it cannot do directly"), *rev. denied*, 268 Kan. 887 (1999); *Dexter v. Dexter*, 661 A.2d 171, 175 n.4 (Md. Ct. Spec. App.) (holding that a veteran may be required to reimburse a former spouse for the diminution in her MRP payments, because such an order does not "hinder [the veteran's] receipt of VA disability benefits"), *cert. denied*, 341 Md. 27 (1995). The split in authority in the

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[6] *See, e.g., Black*, 842 A.2d at 1284 n.3 (citing decisions in California, New Mexico, and Virginia that read *Mansell* narrowly, and contrasting them with decisions in Arkansas and Kansas that read it broadly); *Krapf*, 786 N.E.2d at 325-26 (citing decisions in Maryland, Montana, and Ohio that favor indemnification orders despite *Mansell*); *Youngbluth*, 6 A.3d at 688-89 (citing decisions in Kansas, Michigan, and Hawaii that prohibit indemnification orders based on *Mansell*).

states is thus even more entrenched than the ten supreme court decisions discussed above would suggest.

At this stage—twenty-seven years after *Mansell*—the issue has been fully aired. Accordingly, there is nothing to be gained by leaving the debate to continue in the lower courts. Rather, in the absence of this Court's intervention, the state courts that have not yet ruled will simply be left to choose between the two fully developed positions that are already on offer. Only review by this Court can resolve which of those interpretations of federal law is correct.

II. This Case Presents A Recurring Issue Of National Importance.

This Court's review is warranted because the question presented, which recurs frequently in the state courts, is of vital importance to both the Nation's veterans and their former spouses.

The decisions canvassed above confirm that the question at issue here has arisen frequently in the state courts and will continue to do so. Indeed, the Vermont Supreme Court alone identified two dozen cases in various states' appellate courts that concern whether a former spouse can assert a state-law right to "receive an increased percentage [of MRP] to offset the military servicemember's subsequent application and receipt of disability benefits." *Youngbluth*, 6 A.3d at 686-87 (collecting cases). Moreover, many family-law decisions that implicate this question are likely not appealed, and there is no reliable method to survey the vast universe

of unreported divorce decrees and enforcement or modification orders in state family and trial courts.

It is not surprising that this issue arises frequently in the state courts. Nearly 2 million veterans received MRP in 2014. Office of the Actuary, U.S. Dep't of Defense, *Statistical Report on the Military Retirement System: Fiscal Year 2014*, at 18 (2015) [hereinafter "DOD Report"]. That number has climbed by roughly 100,000 people every five years, confirming that the question presented here is of mounting importance. *Id.* at 17-18. More than one in four current military retirees has waived a portion of MRP in favor of disability compensation. *Id.* at 154. It follows that there are hundreds of thousands of veterans for whom the proper treatment of disability compensation in a divorce proceeding is, or may become, a pressing concern—as well as hundreds of thousands of military spouses to whom the issue is equally important.[7] Because every state has elected to treat MRP as divisible property pursuant to the USFSPA, the post-divorce conversion question, too, will arise in every state. *See Krapf*, 786 N.E.2d at 320 n.4 (reporting that, as of 2003, "every State appears to consider military retirement pay to be divisible marital property").

The question is also important to both military retirees and their former spouses because MRP—including the waived portion that can be divided after divorce in some states, but not others—is often a vital

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[7] *See* DOD Report at 240 (indicating that roughly half of military retirees have named a spouse as a beneficiary of survivor benefits).

source of economic support for the parties involved. *See, e.g., Krapf*, 786 N.E.2d at 324 (noting that "the defendant's military pension was among [the couple's] most substantial marital assets"). The average VA waiver in 2014 was $332 per month—7.4% of the median household income in the United States. *See* DOD Report at 154; U.S. Census Bureau, *Income and Poverty in the United States: 2014*, at 5 (2015). Under the status quo, either many veterans' federal rights to this source of economic support are wrongfully being subordinated to state law, or, alternatively, many of their former spouses are wrongfully being denied this same source of support based on an errant over-reading of what federal law requires. One or the other of these descriptions is accurate—and either circumstance would warrant this Court's review.

III. This Case Offers An Ideal Vehicle For Resolving The Question Presented.

This case presents an excellent opportunity for the Court to resolve the question presented and provide the needed guidance to state courts. The Arizona Supreme Court squarely decided the question presented, and it cleanly separated this issue—which would independently have required a judgment in Petitioner's favor—from the logically distinct questions of state law. Pet. App. 5a-8a. The case also has three further characteristics that help to narrow the issues and ensure that this Court can address the question presented in its clearest possible form.

First, the family court in this case specifically ordered Petitioner to "ensur[e] [Respondent] receive[s] her full 50% of the military retirement without regard

for the disability." *Id.* at 28a. In so doing, it blatantly ordered Petitioner to "reimburse the ex-spouse for reducing his or her share of MRP." *Id.* at 8a. The decision below therefore presents the challenge to the scope of this Court's holding in *Mansell* in its purest form. By contrast, a more difficult question may be presented when a family court modifies a divorce decree to incorporate a material change in the parties' relevant economic situations, taking account of the veteran's waiver of MRP in favor of disability compensation as one contributor to that change. *See Kramer*, 567 N.W.2d at 113 (noting the possibility of that scenario); *Clauson*, 831 P.2d at 1264 (same). In such cases, ambiguities in the state court record concerning whether, or to what extent, the state court incorporated the veteran's MRP waiver into its analysis may present barriers to this Court's review. That difficulty is not present here because the court made no such holistic assessment, and it invoked no such authority. Rather, it simply ordered Petitioner to indemnify Respondent for the reduction in her income on a dollar-for-dollar basis. This case therefore unambiguously presents the question of whether such an order is preempted by federal law.

Second, some cases in this area present challenging questions about the validity of provisions incorporated in a divorce decree that *specifically require* a veteran to indemnify a former spouse for subsequent reductions in MRP. *See Youngbluth*, 6 A.3d at 688 (contrasting, on this basis, *Morgan v. Morgan*, 249 S.W.3d 226, 233 (Mo. Ct. App. 2008), and *In re Marriage of Strassner*, 895 S.W.2d 614, 616 (Mo. Ct. App. 1995)). For instance, in

Strassner, a divorce decree specifically prohibited a veteran from taking any action that would diminish his former spouse's MRP and required him to indemnify her for any loss she might suffer as a result of his breach of this duty. 895 S.W.2d at 616. Similarly, in *Abernethy v. Fishkin*, 699 So. 2d 235 (Fla. 1997), the court upheld an indemnification order because the settlement agreement specifically "guarantee[d] a steady monthly payment to a former spouse through an indemnification provision providing for alternative payments to compensate for a reduction in non-disability retirement benefits." *Id.* at 236-37.

Cases of that kind present an analytically distinct question: "whether a trial court's order prohibiting a spouse from waiving retirement benefits in the future or, in the event of breach, requiring the spouse to indemnify the other spouse for such waived benefits is a prohibited division of disability benefits." *Strassner*, 699 So. 2d at 617; *see also Billeck*, 777 So. 2d at 109 (noting the possible effect of an "indemnification provision"). Cases of that kind may also present ambiguities as to whether the divorce court was interpreting the divorce decree to contain such an explicit indemnification provision, or was merely applying a generally-applicable rule that a veteran who waives MRP after a divorce must indemnify his ex-spouse. Such ambiguities would be impediments to this Court's review: threshold questions as to the state-law basis for a divorce court's order would complicate this Court's analysis of whether the order is permissible under federal law.

Here, however, neither the analytically distinct legal question nor the ambiguity is presented. The Arizona Supreme Court went out of its way to hold that, as a matter of state law, the divorce court's order modified the decree, and did not enforce a pre-existing indemnification provision. As the Arizona Supreme Court explained, "[b]ecause the decree did not require [Petitioner] to indemnify [Respondent] for her loss of MRP, the 2014 Order necessarily modified the original property disposition terms." Pet. App. 10a; *see id.* ("The 2014 Order modifies rather than enforces the dissolution decree's property disposition terms[.]"). This case therefore directly presents the question whether a state court may order reimbursement when previously divided MRP is diminished by a post-divorce disability waiver.

Finally, some courts have noted that the analysis of post-divorce waiver cases is complicated by the possibility of fraud on the part of the military retiree. *See, e.g.*, *Youngbluth*, 6 A.3d at 691-95 (Johnson, J., concurring). When a veteran enters into a property settlement based on the division of MRP, and then promptly waives MRP in favor of disability compensation, that concern is understandable. *See id.* at 691-92 (noting that the military spouse in *Youngbluth* applied for disability compensation one month after the divorce decree became final). This case presents no such complication. Petitioner and Respondent divorced in 1991, and both received equal MRP payments from 1992 to 2005. App 2a-3a. Petitioner did not even submit his disability claim until thirteen years after the divorce. *Id.* at 24a.

Because this case presents the central question that defines the split of authority in its clearest form, stripped of any extraneous factual complications, it offers an unusually good vehicle and warrants this Court's review.

IV. The Decision Below Is Incorrect.

Finally, the Arizona Supreme Court's decision warrants this Court's review because it is wrong.

In *Mansell*, this Court held that under the USFSPA, the portion of a military retiree's MRP that is waived in favor of disability compensation may not be divided between the veteran and his or her former spouse. 490 U.S. at 583. As the Court explained, Congress intended the statute "both to create new benefits for former spouses and to place limits on state courts designed to protect military retirees." *Id.* at 594. It did so by permitting state courts to divide military pensions in divorce, while specifically excluding the portion of a pension that a veteran must forgo to claim disability compensation, the division of which would amount to dividing the disability compensation itself. *See id.* at 588-89. The Court therefore held that this portion of a veteran's MRP remains subject to the rule of *McCarty*, which recognized it as an asset "that Congress intended ... [to] reach the veteran and no one else." *Id.* at 584; *see McCarty*, 453 U.S. at 232 (characterizing MRP as a "personal entitlement" reserved for military retirees).

As a matter of economic substance, the situation presented in this case is simply indistinguishable from the facts of *Mansell*. As modified by the family court,

the divorce decree now directs Petitioner to pay his former spouse (a) half of his MRP, plus (b) half of an amount equivalent to the portion of MRP that was converted to disability compensation (call that sum a + b). Yet *Mansell* held that a divorce court may award an ex-spouse *only* MRP, and may *not* award an amount equivalent to the portion of MRP that was converted to disability compensation. Thus, *Mansell* held that an *initial* divorce decree could not, under federal law, award a sum equivalent to $a + b$. It cannot possibly be the law that *Mansell* merely prohibited such decrees as an *initial* matter, but permitted such decrees if they arose as a result of a divorce court's modification order.

It is no answer for Respondent to argue that she acquired a vested interest in receiving a monthly payment corresponding to half of Petitioner's pre-waiver MRP. The whole point of *Mansell* is that federal law *prohibits* the creation of such a vested interest. Under federal law, a divorce decree can divide MRP, but it cannot divide the portion of MRP that is waived in order to receive disability compensation. A state court cannot evade this federal rule by creating a state-law entitlement to the very assets that federal law prohibits state courts from dividing.

It is true that, under Petitioner's position, a veteran may unilaterally reduce the compensation of his former spouse by electing to take disability benefits. But precisely the same was true in *Mansell* as well. Indeed, the dissent in that case argued that as a result of the majority's holding, "former spouses like Gaye Mansell can, without their consent, be denied a fair

share of their ex-spouse's military retirement pay simply because he elects to increase his after-tax income by converting a portion of that pay into disability benefits." 490 U.S. at 595 (O'Connor, J., dissenting). The majority, however, held that awarding disability compensation in a divorce decree was nonetheless preempted. Granting that "reading the statute literally may inflict economic harm on many former spouses," the majority nonetheless "decline[d] to misread the statute in order to reach a sympathetic result." *Id.* at 594 (majority opinion). Identical reasoning applies here. The USFSPA does not distinguish between disabilities discovered before and after a divorce. Under the USFSPA, Petitioner's disability compensation is an asset "that Congress intended . . . [to] reach the veteran and no one else." *Id.* at 584. He thus should be permitted to keep that asset, regardless of whether his former spouse's monthly payments will decrease as a result.[8]

The Arizona Supreme Court also reasoned that the trial court's order "did not divide the MRP subject to the VA waiver, order [Petitioner] to rescind the waiver, or direct him to pay any amount to

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[8] Indeed, even *Mansell* itself arose as a result of the veteran's post-divorce unilateral action. In *Mansell*, the veteran initially agreed to "a property settlement which provided, in part, that Major Mansell would pay Mrs. Mansell 50 percent of his total military retirement pay, including that portion of retirement pay waived so that Major Mansell could receive disability benefits." 490 U.S. at 586. The litigation arose when Major Mansell asked that the divorce decree be modified four years after the divorce. *Id.*

[Respondent] from his disability pay." Pet. App. 7a; *see also Black*, 842 A.2d at 1285 (adopting the same distinction as the decision below); *Krapf*, 786 N.E.2d at 326 (same); *Johnson*, 37 S.W.3d at 898 (same); *Resare*, 908 A.2d at 1010 (same). But the Arizona Supreme Court's rationale that a court may order Petitioner to pay Respondent the precise *amount* of her putative interest in his disability compensation—so long as the court does not require him to pay "*from* his disability pay"—rests on an untenable economic and legal fiction. "Money is fungible." *Holder v. Humanitarian Law Project*, 561 U.S. 1, 31 (2010); *Sabri v. United States*, 541 U.S. 600, 606 (2004) (same). Moreover, the Court has already rejected this very distinction in analogous circumstances. In *Wissner v. Wissner*, 338 U.S. 655 (1950), a service member had named his parents, rather than his spouse, as the beneficiaries of a federal life insurance policy. After the service member died, a state court concluded that the insurance proceeds were community property under state law and therefore ordered the parents to pay half of the sum to the widow. *Id.* at 658. This Court held the order preempted by the federal statute authorizing a service member to choose his or her beneficiary. As the Court explained: "*Whether directed at the very money received from the Government or an equivalent amount*, the judgment below nullifies the soldier's choice and frustrates the deliberate purpose of Congress. It cannot stand." *Id.* at 659 (emphasis added).

That rule applies equally here. There is no economic difference between an order requiring

Petitioner to turn over 50% of his disability compensation, and an order requiring Petitioner to turn over a sum of money identical to 50% of his disability compensation. Indeed, by the Arizona Supreme Court's rationale, if the decree in *Mansell* had stated that Mrs. Mansell was entitled to receive "Mr. Mansell's retirement pay, plus a sum of money identical to the sum of money that Mr. Mansell waived when he began collecting disability pay," such an order would have complied with federal law. It is exceedingly unlikely that this Court would have adopted such a meaningless distinction.

The Court explained in *Mansell* that "Congress chose the language that requires us to decide as we do, and Congress is free to change it." 490 U.S. at 594. Congress declined to do so, and has instead now left *Mansell*'s protection for a veteran's disability compensation in place for nearly three decades. The Arizona Supreme Court therefore erred by substituting its judgment for the balance struck by Congress in the USFSPA and heeded by this Court.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

KEITH BERKSHIRE
BERKSHIRE LAW OFFICE
5050 N. 40th St.,
Suite 340
Phoenix, AZ 85018
(602) 396-7669

ADAM G. UNIKOWSKY
Counsel of Record
BENJAMIN M. EIDELSON*
JENNER & BLOCK LLP
1099 New York Ave., NW
Suite 900
Washington, DC 20001
(202) 639-6000
aunikowsky@jenner.com

*Not admitted in D.C.; supervised by principals of the Firm.

February 16, 2016

APPENDIX

Appendix A

IN THE

SUPREME COURT OF THE STATE OF ARIZONA

IN RE THE MARRIAGE OF:

SANDRA HOWELL,
Petitioner/Appellee,

and

JOHN HOWELL,
Respondent/Appellant.

No. CV-15-0030-PR
Filed December 2, 2015

Appeal from the Superior Court in Pima County
The Honorable Danelle B. Liwski, Judge
No. D78235
AFFIRMED

Memorandum Decision of the Court of Appeals,
Division Two
2 CA-CV 2014-0112
Filed Dec. 18, 2014
VACATED

COUNSEL:

Charles W. Wirken (argued), Gust Rosenfeld PLC, Phoenix, Attorney for Sandra Howell

Barry G. Nelson, Law Office of Barry Nelson, Cortaro; and Keith Berkshire (argued), Maxwell Mahoney, Berkshire Law Office, PLLC, Phoenix, Attorneys for John Howell

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JUSTICE TIMMER authored the opinion of the Court, in which CHIEF JUSTICE BALES, VICE CHIEF JUSTICE PELANDER and JUSTICES BRUTINEL and BERCH (RETIRED) joined.

JUSTICE TIMMER, opinion of the Court:

¶1 Federal law prohibits courts in marital dissolution proceedings from dividing any portion of military retirement pay ("MRP") waived by a retired veteran to receive service-related disability benefits. In 2010, the Arizona Legislature enacted A.R.S. § 25-318.01 to prohibit courts from "making up" for the resulting reduction in MRP by awarding additional assets to the non-military ex-spouse. The issue before us is whether federal law or § 25–318.01 prohibits courts from fashioning such relief when the veteran elects to waive retirement pay after the court has awarded the ex-spouse a share of MRP in a decree entered before 2010. We hold that neither federal law nor § 25-318.01 precludes such an order.

I. BACKGROUND

¶2 John Howell and Sandra Howell divorced in 1991. Pursuant to the parties' agreement, the dissolution decree provides that "[Sandra] is entitled to and is awarded as her sole and separate property FIFTY PERCENT (50%) of [John's] military retirement when it begins through a direct pay order." John retired from the Air Force in 1992 after a

twenty-year career, and the parties began receiving MRP the next year.

¶3 In 2005, the Department of Veterans Affairs ("VA") approved John's claim that degenerative joint disease in his shoulder directly related to his military service. The VA assigned him a twenty percent disability rating to reflect the extent of his impairment for civilian employment. *See* 38 C.F.R. § 4.1 (explaining the rating system). He qualified for monthly, tax-exempt VA disability payments, which increased yearly. *See* 38 U.S.C. § 5301(a) (bestowing tax-exempt status). To prevent "double dipping," *Mansell v. Mansell*, 490 U.S. 581, 583 (1989), a veteran who receives MRP cannot collect VA disability benefits unless the veteran waives an equivalent amount of MRP (a "VA waiver"), *see* 38 U.S.C. §§ 5304-5305. John elected a VA waiver that was effective from July 1, 2004, the day after he filed his claim with the VA.

¶4 As a result of the VA waiver, the Defense Finance and Accounting Service ("DFAS"), which administers MRP, reduced monthly payments to both John and Sandra, and John began collecting VA disability benefits. For example, John's gross MRP in October 2013 was $1,474. DFAS subtracted the VA waiver amount of $255 to calculate $1,219 in disposable pay and then paid John and Sandra $609.50 each. Simultaneously, the VA paid John $255 in disability benefits. But for the VA waiver, Sandra would have received an additional $127.50 per month.

¶5 In 2013, Sandra filed a motion to enforce the decree's division of MRP and also sought judgment against John for an arrearage amount equaling the

reductions in her share of MRP after the VA waiver. John moved to dismiss the request, arguing that A.R.S. § 25-318.01 barred the family court from requiring John to indemnify Sandra for the reduction in her share of MRP. The court granted Sandra's motion, ruling that she had a vested property right in fifty percent of the MRP, and neither John's election nor § 25-318.01 could deprive her of this right. After an evidentiary hearing, the court awarded Sandra $3,813 in MRP arrearages incurred after December 1, 2011, but found that the equitable doctrine of laches prevented her from recovering earlier arrearages (the "2014 Order"). It also ruled that "[John] is responsible for ensuring [Sandra] receive[s] her full 50% of the military retirement without regard for the disability."

¶6 The court of appeals affirmed but for a different reason. *In re the Marriage of Howell*, 2 CA-CV 2014-0112 (Ariz. App. Dec. 18, 2014) (mem. decision). It held that § 25-318.01, by its terms, does not apply to post-decree enforcement proceedings, such as the one Sandra initiated, and the family court therefore correctly refused to apply the statute. *Id.* at 4–5 ¶¶ 8-9. Sandra did not appeal the family court's laches ruling.

¶7 We granted review because the interpretation of § 25-318.01 is a recurring issue of statewide importance. We have jurisdiction pursuant to article 6, section 5(3) of the Arizona Constitution and A.R.S. § 12-120.24.

II. DISCUSSION

A. Federal preemption

¶8 John argues that, regardless of the applicability of § 25-318.01, the Uniformed Services Former Spouses' Protection Act, 10 U.S.C. § 1408 ("USFSPA"), and *Mansell*, 490 U.S. at 583, preempt the family court's authority to order John to indemnify Sandra for the reduction of her MRP share. Sandra responds, and the court of appeals agreed, that John waived this argument by raising it for the first time on appeal.

¶9 Although generally we refuse to consider arguments newly raised on appeal, this is a prudential rule, and we have made exceptions to consider issues of public importance or that are likely to recur. *Estate of DeSela v. Prescott Unified School Dist. No. 1*, 226 Ariz. 387, 389 ¶ 8, 249 P.3d 767, 769 (2011). Such reasons exist here. Also, the federal preemption issue is a legal one and the parties have fully briefed it. For these reasons, we consider John's arguments.

¶10 The United States Supreme Court and Congress have each addressed whether state courts can divide MRP and disability benefits in dissolution proceedings. In 1981, the Court held that federal law precludes a state court from dividing MRP because doing so would contradict Congress's intent that veterans have "personal entitlement" to such benefits. *McCarty v. McCarty*, 453 U.S. 210, 223–24 (1981). In response to *McCarty*, Congress enacted the USFSPA, which allows states to treat "disposable retired or retainer pay . . . either as property solely

of the member or as property of the member and his spouse in accordance with the law of the jurisdiction of such court." 10 U.S.C. § 1408(c)(1); *see also Edsall v. Superior Court*, 143 Ariz. 240, 241–42, 693 P.2d 895, 896–97 (1984) (noting that the USFSPA made MRP subject to Arizona's community property laws). A few years later, the Court in *Mansell* clarified that although the USFSPA permits state courts to divide disposable MRP in a marital dissolution proceeding, it prohibits them from dividing MRP that has been waived to receive disability benefits. *Mansell*, 490 U.S. at 589.

¶11 In the years following *Mansell*, our court of appeals has several times considered how the family court should proceed when a veteran elects a VA waiver to receive disability benefits *after* entry of a dissolution decree, thereby reducing the ex-spouse's share of previously awarded MRP. In *Harris v. Harris*, 195 Ariz. 559, 562 ¶ 13, 991 P.2d 262, 265 (App. 1999), for example, the court held that *Mansell* does not bar the family court from ordering the veteran to reimburse the ex-spouse for a reduced share of MRP. The court of appeals reached similar conclusions in other cases. *See Danielson v. Evans*, 201 Ariz. 401, 407 ¶ 19, 36 P.3d 749, 755 (App. 2001); *In re Marriage of Gaddis*, 191 Ariz. 467, 469–70, 957 P.2d 1010, 1012–13 (App. 1997). Courts in other jurisdictions have divided on the issue. *See* Mark E. Sullivan & Charles R. Raphun, *Dividing Military Retired Pay: Disability Payments and the Puzzle of the Parachute Pension*, 24 J. Am. Acad. Matrim. Law 147, 158 (2011) ("The large majority of states allow a judge to use equitable

remedies to prevent a retiree from effecting a unilateral reduction of [MRP] granted to the other spouse in the settlement or divorce decree."). *But see Mallard v. Burkart*, 95 So. 3d 1264, 1271 (Miss. 2012) (disagreeing that a clear majority viewpoint exists).

¶12 John argues that the *Harris* line of cases, and the family court here, crafted an equitable remedy barred by the USFSPA and *Mansell*. He quotes *Mansell*'s pronouncement that "the [USFSPA] does not grant state courts the power to treat as property divisible upon divorce military retirement pay that has been waived to receive veterans' disability benefits," 490 U.S. at 594–95, and contends that this proscription also applies to post-decree modification proceedings.

¶13 We agree that the family court cannot divide MRP that has been waived to obtain disability benefits either at the time of the decree or thereafter. But unlike the situation in *Mansell*, that did not occur here. Sandra was awarded fifty percent of the MRP years before John unilaterally elected to receive disability pay in lieu of a portion of the MRP. The 2014 Order did not divide the MRP subject to the VA waiver, order John to rescind the waiver, or direct him to pay any amount to Sandra from his disability pay. Under these circumstances, the family court did not violate the USFSPA or *Mansell* because it did not treat the MRP subject to the VA waiver as divisible property.

¶14 Although requiring John to reimburse Sandra diminishes the overall income increase he received

when he elected the VA waiver (he retains the tax benefits of disability payments), we are not persuaded that the USFSPA prohibits this result. As the *Mansell* Court recognized, "[b]ecause domestic relations are preeminently matters of state law . . . Congress, when it passes general legislation, rarely intends to displace state authority in this area." *Mansell*, 490 U.S. at 587. The Court will not find federal preemption, therefore, "absent evidence that it is 'positively required by direct enactment.'" *Id.* (quoting *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 581 (1979)).

¶15 Nothing in the USFSPA directly prohibits a state court from ordering a veteran who makes a post-decree VA waiver to reimburse the ex-spouse for reducing his or her share of MRP. Absent such direct prohibition, we decline to find federal preemption.

B. Applicability of A.R.S. § 25-318.01

1. Enforcement versus modification

¶16 John argues that the court of appeals evaded the plain language of § 25-318.01 by characterizing the 2014 Order as "enforcing" the dissolution decree rather than as "modifying" it to require indemnification. Section 25-318.01 provides:

> In making a disposition of property pursuant to § 25-318 or § 25-327, a court shall not do any of the following:
>
> 1. Consider any federal disability benefits awarded to a veteran for service-connected disabilities pursuant to 10 United States Code

section 1413a or 38 United States Code chapter 11.

2. Indemnify the veteran's spouse or former spouse for any prejudgment or postjudgment waiver or reduction in military retired or retainer pay related to the receipt of the disability benefits.

3. Award any other income or property of the veteran to the veteran's spouse or former spouse for any prejudgment or postjudgment waiver or reduction in military retired or retainer pay related to the receipt of the disability benefits.

See also A.R.S. § 25-530(A) ("In determining whether to award spousal maintenance or the amount of any award of spousal maintenance to a requesting party, the court shall not consider any federal disability benefits awarded to the other spouse for service-connected disabilities pursuant to 10 United States Code section 1413a or 38 United States Code chapter 11.").

¶17 By its express language, § 25-318.01 applies only to property dispositions made pursuant to §§ 25-318 and -327. Section 25-318 governs the division of property in legal separation or marriage dissolution proceedings, while § 25-327 applies when a party seeks to revoke or modify a previously ordered division of property. But nothing in § 25-318.01 restricts the family court's ability to enforce a disposition order. *Cf. In re Marriage of Dougall*, 234 Ariz. 2, 8 ¶ 19, 316 P.3d 591, 597 (App. 2013) (deciding that nothing in § 25-530 prevented the court from considering VA

disability benefits in determining the payment of arrearages stemming from an existing spousal maintenance award). The issue here is whether the family court modified the dissolution decree's property disposition terms pursuant to § 25-327, thereby triggering § 25-318.01, or merely enforced the decree. Because resolution of this issue turns on both statutory interpretation and the 2014 Order's meaning, we conduct a de novo review. *See Danielson*, 201 Ariz. at 406 ¶ 13, 36 P.3d at 754.

¶18 The 2014 Order modifies rather than enforces the dissolution decree's property disposition terms, and § 25-318.01 therefore applies. The decree awarded Sandra fifty percent of John's MRP, regardless of the amount, and DFAS paid her that percentage each month. It was not necessary to "enforce" the decree as DFAS was honoring its terms. Instead, Sandra sought to redress a changed circumstance: John had reduced the MRP amount by electing a VA waiver. Unable to order John to rescind election of a benefit bestowed by Congress, *see* U.S. Const. art. VI, cl. 2, the family court ordered John to pay Sandra for her reduced share of MRP. Because the decree did not require John to indemnify Sandra for her loss of MRP, the 2014 Order necessarily modified the original property disposition terms. As a result, despite Sandra's request that the family court enforce the decree, the family court necessarily modified the initial property disposition terms pursuant to § 25-327, and § 25-318.01 therefore applies. Consequently, the court of appeals erred by holding that § 25-318.01's plain language makes its restrictions inapplicable here. We

therefore consider whether the family court properly refused to apply § 25-318.01 because to do so would have unconstitutionally deprived Sandra of a vested property right.

2. Vested property rights

¶19 Both parties acknowledge that Sandra obtained a vested property right in her share of MRP when the family court entered the decree in 1991. *Cf. Koelsch v. Koelsch*, 148 Ariz. 176, 181, 713 P.2d 1234, 1239 (1986) ("When the community property is divided at dissolution . . . each spouse receives an immediate, present, and vested separate property interest in the property awarded to him or her by the trial court . . . [and] a former spouse loses any interest in and control over that separate property."). They differ, however, on the scope of that right. John contends that Sandra has a vested right in fifty percent of whatever amount of MRP is paid by DFAS each month. He characterizes her interest in the precise amount of those payments as merely expectant and argues that § 25-318.01 therefore can apply to diminish that interest. Sandra counters that she possesses a vested property right in the amount of her MRP share as calculated by DFAS and unencumbered by any adjustments unilaterally initiated by John. She contends that neither John's election of the VA waiver nor subsequent legislation could affect that right without depriving her of a vested property right.

¶20 We begin by examining the categories of property rights. A property right becomes vested "when every event has occurred which needs to occur to make the implementation of the right a

certainty." *Aranda v. Indus. Comm'n of Ariz.*, 198 Ariz. 467, 471 ¶ 18, 11 P.3d 1006, 1010 (2000). The right is "actually assertable as a legal cause of action or defense or is so substantially relied upon that retroactive divestiture would be manifestly unjust." *Id.* (quoting *San Carlos Apache Tribe v. Superior Court*, 193 Ariz. 195, 200 ¶ 15, 972 P.2d 179, 184 (1999)). By contrast, a right is expectant when it depends on the continued existence of present circumstances "until the happening of some future event." *Id.* at 471–72 ¶ 21, 11 P.3d at 1010–11 (citation omitted). A contingent right is one that comes into existence only if a specified event or condition occurs. *Id.* at 472 ¶ 21, 11 P.3d at 1011.

¶21 In this case, Sandra had a vested right to receive future distributions of her share of MRP unencumbered by any adjustments initiated by John. MRP is a form of deferred compensation. *Van Loan v. Van Loan*, 116 Ariz. 272, 274, 569 P.2d 214, 216 (1977). Thus, the MRP earned during the parties' marriage belonged to the community and was divisible upon dissolution of the marriage. *See id.* After the dissolution decree became final and the corresponding qualified domestic relations order issued, nothing more needed to occur to entitle Sandra to fifty percent of the MRP; it had already been earned. *See* 10 U.S.C. § 1408(d) (requiring payment of disposable MRP share to ex-spouse upon receipt of court order). Additionally, both parties' shares, which were subject to equal cost-of-living and other adjustments, could be precisely calculated by DFAS each month and did not depend on any future event or

contingency. *See* 10 U.S.C. §§ 1401–1414 (establishing methods for computing monthly MRP payments); *see also Koelsch*, 148 Ariz. at 184 n.9, 713 P.2d at 1242 n.9 (characterizing cost-of-living increases to pension benefits attributable to the marital community as a community asset). Under these circumstances, the decree created an immediate right to future payment of fifty percent of the MRP, including cost-of-living increases, earned during the marriage as calculated by DFAS. That amount vested as Sandra's property right and is not merely expectant.

¶22 One spouse cannot invoke a condition solely within his or her control to defeat the community interest of the other spouse. *Koelsch*, 148 Ariz. at 181, 713 P.2d at 1239. By electing the VA waiver, John did precisely that by essentially converting part of Sandra's MRP share. The 2014 Order restored Sandra's share of community assets by ordering John to "make up" the reduction and pay arrearages. The remaining issue here is whether the family court erred by ruling that § 25-318.01 could not prohibit indemnification in these circumstances.

¶23 Once a property right vests, the due process guarantee of our constitution, Ariz. Const. art. 2, § 4, prohibits application of legislation that "[would] disturb vested substantive rights by retroactively changing the law that applies to completed events." *San Carlos Apache Tribe*, 193 Ariz. at 205 ¶ 15, 972 P.2d at 189; *see also Aranda*, 198 Ariz. at 471 ¶ 16, 11 P.3d at 1010 (to same effect). John concedes that "if Sandra [had] obtained relief prior to 2010, newly enacted A.R.S. § 25-318.01 could not be retroactively

applied to change the result." He argues, however, that because Sandra sought relief after 2010, application of the statute would be prospective and therefore constitutional.

¶24 John's argument is unpersuasive. Sandra sought relief for the reduction of her MRP share, which vested as a property right in 1991. Regardless of the timing of her request, application of § 25-318.01 to prohibit the court from remedying the deprivation would diminish Sandra's vested property right in violation of the due process guarantee. Consequently, the family court correctly refused to apply § 25-318.01 to these facts.

III. CONCLUSION

¶25 We hold that federal law does not preempt the family court's authority to order a retired veteran to indemnify an ex-spouse for a reduction in MRP caused by a post-decree waiver of MRP made to obtain disability benefits. We also hold that A.R.S. § 25-318.01 cannot be applied to prohibit the court from entering an indemnification order in these circumstances if the ex-spouse's share of MRP vested as a property right before the statute's enactment. Because Sandra did not appeal the family court's application of laches in awarding arrearages dating only from 2011, we do not disturb that ruling. We vacate the court of appeals' decision and affirm the family court's judgment.

Appendix B

Court of Appeals of Arizona,
Division 2.

In re the Marriage of Sandra HOWELL,
Petitioner/Appellee.

And

John Howell,
Respondent/Appellant.

No. 2 CA-CV 2014-0112.

Dec. 18, 2014.

Appeal from the Superior Court in Pima County;
No. D78235; The Honorable Danelle B. Liwski, Judge.
AFFIRMED.

MEMORANDUM DECISION

HOWARD, Judge.

¶1 Appellant John Howell[1] appeals from the trial court's judgment in favor of his former wife, Sandra Howell, on her petition to enforce the decree of dissolution awarding her fifty percent of his military retirement benefits. John argues that the court erred

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[1] John originally filed a cross-appeal in response to Sandra's appeal. Sandra withdrew her appeal, and we now treat John as the appellant.

under both state and federal law in awarding Sandra arrearages and ordering prospective payments from John to Sandra to reimburse her for any portion of the fifty percent she did not receive because John had waived a portion of his retirement benefits in favor of military disability pay. Because the trial court did not err, we affirm.

Factual and Procedural Background

¶2 The facts necessary to deciding this appeal are not in dispute. In 1991, the trial court awarded Sandra fifty percent of John's military retirement benefits to be paid by direct pay order, and payments began in 1993. In 2005, John received a twenty-percent disability rating from the Department of Veterans Affairs ("VA") pursuant to Title 38 of the United States Code, and he waived a portion of his retirement benefits in favor of disability payments, which caused a dollar for dollar reduction in his retirement benefit payments. As a result, the direct payments to Sandra on her share of the retirement benefits also were reduced.

¶3 In November 2013, Sandra filed a petition to enforce the military retirement provision in the decree.[2] In response, John filed a motion to dismiss the petition, alleging that A.R.S. § 25-318.01 prohibited Sandra from seeking indemnification for any reduction in retirement pay resulting from John's receipt of disability benefits.

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[2] Sandra's petition is entitled "Request to Enforce Support 50% Retirement Military." We note, however, the decree awarded her fifty percent of the military retirement benefits "as her sole and separate property," and not as part of her spousal maintenance award.

The trial court denied the motion on the grounds that application of § 25-318.01 would retroactively change Sandra's vested property rights. After an evidentiary hearing, the court awarded Sandra arrearages[3] and ordered that John "ensur[e Sandra] receive her full 50% of the military retirement without regard for disability" going forward. We have jurisdiction over John's appeal pursuant to A.R.S. §§ 12-120.21(A)(1) and 12-2101(A)(2).

Failure to File an Answering Brief

¶4 Sandra failed to file an answering brief in this case. "When an appellant raises debatable issues, the failure to file an answering brief generally constitutes a confession of reversible error in civil cases." *State v. Greenlee Cnty. Justice Court, Precinct 2*, 157 Ariz. 270, 271, 756 P.2d 939, 940 (App.1988). But that doctrine is discretionary, and we are reluctant to apply it when there was no error below. *See In re $26,980.00 U.S. Currency*, 199 Ariz. 291, ¶20,18P.3d 85,91 (App.2000). Therefore, we review the merits of John's appeal.

Applicability of A.R.S. § 25-318.01

¶5 John first argues the trial court erred by concluding that § 25-318.01 did not apply to this case. He contends the statute prohibits any post-decree award of other income or property to compensate for "postjudgment waiver or reduction in military

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[3] Due to Sandra's delay in seeking compensation for the reduction in benefits, the trial court applied the equitable doctrine of laches and awarded arrearages only from December 1, 2011, with no prejudgment interest.

retirement."§ 25-318.01. We review de novo the interpretation of statutes governing dissolution proceedings. *See Merrill* v. *Merrill*, 230 Ariz. 369, ¶ 7, 284 P.3d 880, 883 (App.2012).

¶6 Before the enactment of § 25-318.01, 2010 Ariz. Sess. Laws, ch. 70, § 2, this court determined that veterans could not frustrate the decree of dissolution unilaterally by waiving retirement pay in favor of other benefits not subject to division as community property in dissolution proceedings by operation of federal law. *Danielson* v. *Evans*, 201 Ariz. 401, ¶¶ 19-24,36 P.3d 749,755-56 (App.2001); *In re Marriage of Gaddis*, 191 Ariz. 467,469,957 P.2d 1010,1012 (App. 1997). Instead, we required the veterans in those cases to indemnify the former spouse for the loss to their share of the community property resulting from waiver. *Danielson*, 201 Ariz. 401, ¶¶ 19, 33,36 P.3d at 755,758-59; *Gaddis*, 191 Ariz, at 470, 957 P.2datl013.

¶7 In 2010, our legislature enacted § 25-318.01 and its counterpart A.R.S. § 25-530. 2010 Ariz. Sess. Laws, ch.70, §§ 2, 3; *see also* 2014 Ariz. Sess. Laws, ch. 239, §§ 1, 2 (expanding statutes to encompass both Title 10 and Title 38 disability pay). Section 25318.01 applies when the superior court "mak[es] a disposition of property pursuant to [A.R.S. §] § 25-318 or 25-327" and prohibits the court from considering "any prejudgment or postjudgment waiver or reduction in military retired or retainer pay related to the receipt of disability benefits" awarded under Title 38, chapter 11 of the United States Code or 10 U.S.C. § 1413a.

¶8 Section 25-318 governs the disposition of property "in a proceeding for dissolution of the

marriage, or for legal separation."Section 25-327 governs the modification or termination of "the provisions of any decree respecting maintenance or support," and the modification or revocation of "the provisions as to property disposition ... [under] conditions that justify the reopening of a judgment under the laws of this state."Sections 25-318 and 25-327 do not concern proceedings for the enforcement of the terms of the decree of dissolution. Accordingly, § 25-318.01, by its plain language, does not apply to post-decree enforcement proceedings. *See In re Marriage of Gibbs*, 227 Ariz. 403, ¶ 10, 258 P.3d 221, 225 (App.2011) (we interpret statutes according to their plain language).

¶9 The original property distribution in this case under § 25-318 occurred in 1991. Sandra did not attempt to modify the property distribution pursuant to § 25-327. Therefore, A.R.S. § 25318.01 did not apply to the enforcement proceedings initiated by Sandra, and the trial court was not prohibited from considering the reduction in her share of the retirement pay occasioned by John's receipt of disability pay. Rather, the 1991 decree entitled her to a full fifty-percent of the military retirement, and John must indemnify her for any reduction she suffered due to his unilateral waiver in favor of disability pay. *See Danielson*, 201 Ariz. 401, ¶ 19-24, 33, 36 P.3d at 755-56, 758-59; *Gaddis*, 191 Ariz, at 469-70, 957 P.2d at 1012-13.

¶10 John points to language from our decision in *Merrill* to support his contention that § 25-381.01 prohibits the trial court from considering waiver or reduction due to disability pay in any post-decree

proceedings. In *Merrill*, we stated that the application of § 25-318.01 to a "postjudgment waiver or reduction in military retirement" suggested the statute applied to " 'postjudgment' proceedings" as well as "an original decree of dissolution." 230 Ariz. 369, ¶ 24, 284 P.3d at 886. But this statement is dictum. *Id.* ¶¶ 24-25; *see also Creach v. Angulo*, 186 Ariz. 548, 552, 925 P.2d 689, 693 (App.1996) ("Dictum is not binding precedent...."). And we made it with reference to the statute's application to proceedings under § 25-327, "which governs a court's power, *inter alia*, to modify a dissolution decree's distribution of community property."*Merrill*, 230 Ariz. 360, ¶ 24, 284 P.3d at 886. As noted above, the reference in § 25-318.01 to § 25-327 indicates its applicability to post-decree proceedings for the modification or revocation of property distribution, not for the enforcement of a decree's property settlement terms.

¶11 Because we conclude that § 25-318.01 does not apply to these enforcement proceedings, we need not address John's second argument that the trial court erred by ruling the application of § 25318.01 would have changed Sandra's vested property rights retroactively.

Federal Preemption

¶12 John further argues that 10 U.S.C. § 1408(a)(4)(B), (c), which allows the division of "disposable retired pay" as community property in dissolution proceedings, but which subtracts from "disposable retired pay" amounts waived in order to receive disability pay under Title 38, prohibited the trial court's consideration of waived retirement pay. Yet he did not raise this argument below and therefore

has waived review of the issue on appeal. *See Chopin* v. *Chopin*, 224 Ariz. 425, ¶ 22, 232 P.3d 99, 105 (App.2010).

¶ 13 John claims in his opening brief that he raised this argument in his motion for reconsideration filed after the trial court ruled on the applicability of § 25-318.01. But to support this claim, he points only to one sentence in a block quote from our *Merrill* decision that states, "Federal law precludes division of [disability] benefits as community property."230 Ariz. 369, ¶18, 284 P.3d at 883, *citing* 10 U.S.C. § 1408(a) (4)(C). And the only argument John made in his motion for reconsideration was that the application of § 25318.01 in this case would have been prospective rather than retroactive, and therefore constitutional.

¶14 John's passing mention of the preemption issue in a block quote intended to support his argument on a different issue did not suffice to raise the issue to the court below. *See Airfreight Express Ltd.* v. *Evergreen Air Ctr., Inc.*, 215 Ariz. 103, ¶17, 158 P.3d 232,238-39 (App.2007) (trial court "must have had the opportunity to address the issue on its merits"). Moreover, even if he had raised it in his motion, we do not review issues raised for the first time in a motion for reconsideration, and we would nonetheless deem the issue waived. *See Ramsey v. Yavapai Family Advocacy Ctr.*, 225 Ariz. 132, ¶18,235 P.3d 285, 290 (App.2010).

Disposition

¶15 For the foregoing reasons, we affirm the trial court's ruling.

Judge HOWARD authored the decision of the Court, in which Presiding Judge KELLY and Judge VASQUEZ concurred.

Appendix C

ARIZONA SUPERIOR COURT, PIMA COUNTY

HON. DANELLE B. LIWSKI CASE NO. D78235

COURT REPORTER: John Bouley DATE: May 22, 2014
Courtroom – 686

SANDRA K. HOWELL
Petitioner

VS.

JOHN Q. HOWELL
Respondent

RULING

UNDER-ADVISEMENT RULING—FAMILY LAW RE RETIREMENT ARREARS

On March 10, 2014 this Court found "that Respondent/Husband owed Petitioner/Wife 50% of the military retirement regardless of the disability rating as his election unilaterally alters a vested property right." The Court set a status conference on March 20, 2014 to determine the discovery needs of each party. The Court held a hearing on May 20, 2014 to determine

Nathan Rothschild
Law Clerk

what Respondent/Husband owed in retirement arrearages.

The parties were divorced in 1991. The parties entered into an agreement on April 16, 1991. The agreement provided, "Petitioner is entitled to and is awarded as her sole and separate property FIFTY PERCENT (50%) of Respondent's military retirement when it begins through a direct pay order." This agreement was signed by the court as a Decree of Dissolution of Marriage on April 16, 1991. Payment of the military retirement began in 1992.

On January 25, 2005, Respondent/Husband received a disability evaluation of 20% from the Veteran Administration (VA). This disability evaluation was post dated to June 30, 2004 when Respondent/Husband first petitioned for his disability. Exhibit B. The disability rating given to Respondent/Husband was done under Title 38 Disability.

The effect of this disability rating was a dollar for dollar reduction of the military retirement pay in favor of disability pay. One effect of this election was a reduction in Petitioner/Wife's share of the retirement. Petitioner/Wife was dependent on and expecting this money.

Petitioner/Wife became aware of this change in 2005 when her monthly payment was reduced. Petitioner/Wife did not act. The first evidence of action made by Petitioner/Wife appears to be an inquiry she

Nathan Rothschild
Law Clerk

made with the Department of Defense Finance and Accounting Service ("DFAS"). Based upon testimony and exhibit A this contact was made around December 1, 2011. Petitioner/Wife did not file to enforce the decree until November 6, 2013.

Respondent/Husband has raised the affirmative defense of laches to bar recovery of all arrearages dating to before December 1, 2013. "Laches, a form of estoppels, is a defense where, because of delay or by lapse of time, the party asserting the defense either is injured (by the mere lapse of time) or changes his position in reliance on the other party's inaction. Additionally, the delay must come after the party against whom the defense is asserted becomes aware of or has knowledge of, his right." *Jerger v. Rubin*, 106 Ariz. 114, 117, 471 P.2d 726, 729 (1970). "The elements necessary to constitute laches are lack of diligence on the part of one and injury to another due to the lack of diligence." *Longshaw v. Corbitt*, 4 Ariz. App. 408, 414, 420 P.2d 980, 986 (1966). "Fundamental fairness is the *sine qua non* of the laches doctrine." *Harris v. Purcell*, 193 Ariz. 409, 414, 973 P.2d 1166, 1171 (1998).

In this case, Petitioner/Wife had knowledge of the reduction in her retirement benefits and did nothing to inquire into what had happened. Respondent/Husband relied on her inaction and used the extra money he was receiving. Now, Petitioner/Wife wants to be made whole from damages that occurred a decade ago to the

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detriment of Respondent/Father who has depleted the misappropriated monies.

Respondent/Husband had met his burden to show that the doctrine of laches is applicable to this case. Petitioner/Wife did not act in a timely matter and to now make Respondent/Father pay the whole amount of misappropriated funds would be inequitable. The Court of Appeals have considered similar situations, "if the husband treated the asset as his separate property and disposed of it according to his needs, the doctrine of laches should be applied to prevent collection of the sums that have already been spent." *Flynn v. Rogers*, 172 Ariz. 62, 67, 834 P.2d 148, 153 (1992). *See also: Beltran v. Razo*, 163 Ariz. 505, 507, 788 P.2d 1256, 1258 (Ct. App. 1990). Using this rule it would be inequitable to hold Respondent/Husband accountable for money spent before Petitioner/Wife acted. Once Petitioner/Wife began to act to remedy the damage done to her equity requires that she be allowed to recover.

THE COURT FINDS the equitable defense of laches prevents Petitioner/Wife from being able to recover nay arrearage from before December 1, 2011.

The Court using Exhibit C and the testimony from the parties was able to reconstruct what Respondent/Husband owed to Petitioner/Wife from December 1, 2011 to May 30, 2014. From December 1, 2011 to November 30, 2013 Respondent/Husband

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generated three thousand thirty six dollars in arrears ($3,036.00). On December 1, 2013 Respondent/Husband received a cost of living adjustment which made his disability waiver worth two hundred fifty nine dollars ($259.00) (rounding up) a month. Petitioner/Wife was entitled to one hundred twenty nine dollars and fifty cents ($129.50) of this retirement benefit. From December 1, 2013 to May 30, 2014 Respondent/Husband generated an arrearages of seven hundred seventy seven dollars ($777.00).

THE COURT FINDS from December 1, 2011 to May 30, 2014 Respondent/Husband has generated an arrearage of three thousand eight hundred thirteen dollars ($3,813.00).

Respondent/Husband makes two additional request of the Court. First Respondent/Husband asks that the Court use the equitable doctrine of laches to apply no interest to the arrearages and also to allow Respondent/Husband to pay back the arrearages for as long as it was allowed to generate.

It would also be inequitable to allow Respondent/Husband to have three years to pay back the arrearage. Respondent/Husband used misappropriated money to the benefit of himself. Petitioner/Wife has suffered because of her inaction and now needs the money immediately.

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IT IS ORDERED that there shall be no interest applied on the arrearages for the time in which they accrued.

IT IS ORDERED granting Petitioner/Wife, Sandra K. Howell, a judgment against Respondent/Husband, John Q. Howell, in the amount of THREE THOUSAND EIGHT HUNDRED THIRTEEN dollars ($3,813.00) plus interest at the legal rate for any amount due and owing after June 1, 2014.

IT IS ORDERED that Respondent/Husband is responsible for ensuring Petitioner/Wife receive her full 50% of the military retirement without regard for the disability. Failure to do so shall be punishable by contempt. Contempt may include additional fines, fees, and jail time.

/ss/
HON. DANELLE B. LIWSKI

cc: Hon. Danelle B. Liwski
Barry G. Nelson, Esq.
Sandra K. Howell
Clerk of Court – Under Advisement Clerk

Nathan Rothschild
Law Clerk

Appendix D

ARIZONA SUPERIOR COURT, PIMA COUNTY

HON. DANELLE B. LIWSKI CASE NO. D78235

DATE: March 17, 2014

SANDRA K. HOWELL
Petitioner

and

JOHN Q. HOWELL
Respondent

RULING

IN CHAMBERS RE MOTION TO RECONSIDER

The court has received a motion to reconsider its March 10, 2014 ruling. The Court having read the motion and considered the arguments contained therein;

IT IS ORDERED DENYING the motion to reconsider filed on March 14, 2014.

/ss/
HON. DANELLE B. LIWSKI

Nathan Rothschild
Law Clerk

cc: Hon. Danelle B. Liwski
Barry G. Nelson, Esq.
Sandra K. Howell

Nathan Rothschild
Law Clerk

Appendix E

ARIZONA SUPERIOR COURT, PIMA COUNTY

HON. DANELLE B. LIWSKI CASE NO. D78235

COURT REPORTER: John Bouley DATE: March 10, 2014
Courtroom – 686

SANDRA K. HOWELL
Petitioner

VS.

JOHN Q. HOWELL
Respondent

RULING

UNDER-ADVISEMENT RULING—FAMILY LAW

On November 6, 2013, Petitioner/Wife filed a motion to enforce the decree. Specifically the motion requested to enforce the military retirement provision of the decree. The Decree of Dissolution provides that Petitioner/Wife receive half of Respondent/Husbands military retirement.

On December 5, 2013, Respondent/Husband filed a motion to dismiss Petitioner/Wife's motion to enforce.

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Respondent/Husband argues that because the reduction in the payments was due to his military disability under Title 38 of the United States Code chapter 11 (Title 38 Disability) he is not required to pay the difference in benefits and the Court cannot require him to pay or create an offset under A.R.S. §25-318.01.

On January 7, 2013, the parties appeared before the Court. The Court took the matter under advisement and gave leave to Petitioner/Wife to obtain evidence to show the Respondent/Husband disability payments were under a different title. Petitioner/Wife was unable to show Respondent/Husband was receiving anything other than Title 38 Disability.

HISTORY OF THE CASE:

The parties were divorced in 1991. The parties entered into an agreement on April 16, 1991. The agreement provided, "Petitioner is entitled to and is awarded as her sole and separate property FIFTY PERCENT (50%) of Respondent's military retirement when it begins through a direct pay order." This agreement was signed by the court as a Decree of Dissolution of Marriage on April 16,1991. Payment of the military retirement began in 1992.

On January 25, 2005, Respondent husband received a disability evaluation of 20% from the Veteran Administration (VA). This disability evaluation was post dated to June 30, 2004 when Respondent/Husband first petitioned for his disability. Exhibit B. The

disability rating given to Respondent/Husband was done under Title 38 Disability.

The effect of this disability rating was a dollar for dollar reduction of approximately $250 per month of the military retirement pay in favor of disability pay. One effect of this election was a reduction in Petitioner/Wife's share of the retirement pay by approximately $125 per month. Petitioner/Wife was dependent on and expecting this money.

LEGAL ARGUMENTS:

Respondent/Husband through counsel argues that A.R.S. §25-318.01 effectively removes the Courts jurisdiction to divide or consider the Title 38 disability and therefore the claim must be dismissed.

On July 29, 2010, A.RJ. §25-318.01 became effective. A.R.S. §25.318.01 provides:

> In making a disposition of property pursuant to § 25-318 or §25-327, a court shall not do any of the following:
>
> > 1. Consider any federal disability benefits awarded to a veteran for service-connected disabilities pursuant to 38 United States Code chapter 11.
> >
> > 2. Indemnify the veteran's spouse or former spouse for any prejudgment or postjudgment waiver or reduction in

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military retirement or retainer pay related to receipt of the disability benefits.

3. Award any other income or property of the veteran to the veteran's spouse or former spouse for any prejudgment or postjudgment waiver or reduction in military retirement or retainer pay related to receipt of the disability benefits.

The Court disagrees with Respondent/Father. In order for the statute to remove the Court's ability to make a disposition of Title 38 disability the statute must act retroactively to change a vested property right. Based on due process concerns, and the general disfavor of retroactive legislation the statute cannot be read to retroactively effect property settlement agreements.

One of the problems with retroactive legislation affecting property rights is that an individual cannot conduct rational business decisions based on the law if the law is subject to change and divest their property rights. An individual should be able to make an informed decision and not face adverse consequences because of the whim and fancy of the legislature. *See: Landgraf v. USI Film Products*, 511 U.S. 244, 264-265 (1994).

In this case, Petitioner/Wife could not have adequately protected herself against the legislation which effectively divests her proprietary interest in the retirement account.

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Respondent/Husband through counsel agrees that the date the agreement was signed Petitioner/Wife had a vested interest in fifty percent of the military retirement. *Koelsch v Koelsch.* 148 Ariz, 176, 181, 713 P.2d 1234, 1239 (Holding: when a court divides community property in a decree of dissolution each party receives an immediate vested separate property interest in all the property awarded to them). Respondent/Husband through counsel also stated that under *Gaddis,* Respondent/Husband could not unilaterally divest her interest in the retirement. *In Re Marriage of Gaddis,* 191 Ariz. 467, 469, 957 P.2d 1010, 1012 (1997); *see also Danielson* v. *Evans,* 201 Ariz. 401, 407-08 ¶¶ 19-24, 36 P.3d 749, 755-56 (App. 2001). Respondent/Husband argues that *Gaddis* has been effectively overruled by *Merrill* and A.R.S. 25-318.01. *Merrill* dealt with Title 10 disability, Title 10 disability is not considered by A.R.S. 25-318.01. *Merrill* v. *Merrill,* 230 Ariz. 369, ¶27, 284 P.3d 880, 887 (2012). *Merrill is* easily distinguishable from *Gaddis* for this reason. *Merrill* also voices concern about the constitutional viability of A.R.S. 25-318.01 if it were to be applied to already vested property rights. *Merrill,* 230 Ariz. 369, ¶27 & n.5, 284 P.3d at 887 & n.5. *Merrill* fails to overturn *Gaddis* and in footnote 5 specifically states concerns about applying the decision to vested property rights.

THE COURT FINDS Petitioner/Wife had a vested properly right in 50% of Respondent/Husbands military retirement.

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THE COURT FINDS Respondent/Husband violated the decree by unilaterally decreasing the retirement pay in favor of disability pay.

Respondent/Husband argues that despite the violation A.R.S, §25-318.01 doesn't allow for the court to redress this violation. A vested property right is defined as, "actually assertable as a legal cause of action or defense or is so substantially relied upon that retroactive divestiture would be manifestly unjust." *Hall v. A.N.R. Freights systems, Inc.*, 149 Ariz. 130, 139, 717 P.2d 434, 443. To protect against this manifest injustice, statutes passed by the state legislature shall not be read to be retroactive unless there is an express statement that the statute shall apply retroactively. A.R.S. §1-244. This rule is compatible with the long held policy against retroactive legislation. *See: Landgraf v. USI Film Products*, 511 U.S. 244, 264-265 (1994).

The Arizona Supreme Court has found as a general principle "legislation may not disturb vested substantive rights by retroactively changing the law that applies to completed events." *San Carlos Apache Tribe v, Superior Court*, 193 Ariz 195, ¶15, 972 P.2d 179, 189 (1999). For the legislature to retroactively change such property rights violates the due process clause contained in, article 2, section 4 of the Arizona constitution. *Id*

If the Court has no ability to redress the damage because of the statute the statute would be in violation of basic concepts of fairness and due process of law.

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Law Clerk

Courts have a duty to interpret statutes in a way that makes them constitutionally sound. *Blake v. Schwartz*, 202 Ariz. 120, ¶27, 42 P.3d 6, 12 (App. 2002) (citations omitted), *quoting Edward J. DeBartolo Corp. v, Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988).

THE COURT FINDS that A.R.S, §25-318.01 contains no express statement that the statute shall apply retroactively

THE COURT FINDS A,R.S. §25-318.01 cannot be applied retroactively to decree's of dissolution before its passage on July 29, 2010.

THE COURT FINDS A.R.S. §25-318.01 does not apply to vested property rights which vested prior to July 29,2010.

THE COURT ORDERS Respondent/Father's motion to dismiss be denied along with all relief requested therein.

THE COURT FINDS that Respondent/Husband had an obligation to pay Petitioner/Wife 50% of the military retirement as ordered in the decree.

THE COURT FINDS that Respondent/Husband owed Petitioner/Wife 50% of the military retirement regardless of the disability rating as his election unilaterally alters a vested property right

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THE COURT ORDERS the parties to appear before the court at 4:15 p.m. for half an hour on March 20, 2014 for a status conference to determine discovery needs and set a date for an evidentiary hearing.

/ss/
HON. DANELLE B. LIWSKI

cc: Hon. Danelle B. Liwski
Barry G. Nelson, Esq.
Sandra K. Howell
Clerk of Court – Under Advisement Clerk

Nathan Rothschild
Law Clerk

Appendix F

IN THE SUPERIOR COURT OF THE
STATE OF ARIZONA

IN AND FOR THE COUNTY OF PIMA

In Re the Marriage of	)	
	)	
SANDRA K. HOWELL,	)	No. D-78235
	)	
Petitioner,	)	
and	)	
	)	DECREE OF
JOHN Q. HOWELL,	)	DISSOLUTION
	)	OF MARRIAGE
Respondent.	)	
	)	

This matter coming on regularly to be heard with the Petitioner appearing in person and through her attorney, KAREN E. ALLEN, and the Respondent appearing in person and through counsel, CONSTANCE H. SACRA, having been regularly served and an Answer being filed within the time allowed by law; and the evidence having been adduced;

THE COURT FINDS AS FOLLOWS:

1. That at the time this action was commenced, the Petitioner was domiciled in the State of Arizona and a resident o the County of Pima, Arizona, and that said domicile had been so maintained for a period in excess

of ninety (90) days immediately prior to the filing of said Petition;

2. That there are two minor children of the parties to this marriage; DEIDRE R. HOWELL, whose date of birth is 9/21/78 and JASON T. HOWELL, whose date of birth is 5/31/82 and the Wife is not now pregnant.

3. That the martial relationship heretofore existing between the parties is irretrievably broken.

4. That the conciliation provisions of A.R.S. Section 25-381.09 either do not apply or have been met.

5. That the Court obtained jurisdiction over both parties by acceptance service on Respondent of the Summons and Petition for Dissolution.

6. That to the extent it has jurisdiction to do so, the Court has herein considered, approved and made provision for the disposition of property and debts.

7. That to the extent it has jurisdiction to do so, the Court has herein considered, approved and made provision for child custody and child support.

WHEREFORE, there being good cause:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED, that the marital relationship heretofore existing between the parties is hereby dissolved and the parties are restored to the status of single persons;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED as follows:

1. The parties will keep the personal property in his or her possession, except that Petitioner will give the Respondent the tape recorder.

2. Petitioner is awarded the 1985 Oldsmobile and Respondent is awarded the 1990 Honda, subject to the lien therefore. Petitioner shall provide evidence to Respondent that the Oldsmobile is registered and insured in her name.

3. Respondent shall pay and hold Petitioner harmless therefrom any community debts which he assumed in February, 1990 for the repair of Petitioner's automobile.

4. The parties shall divide the 1990 income tax refund equally.

5. Petitioner is entitled to and is awarded as her sole and separate property FIFTY PERCENT (50%) of Respondent's military retirement when it begins through a direct pay order.

It is further ORDERED ADJUDGED AND DECREED

1. That the custody of the minor children, DEIDRE RENEE HOWELL and JASON TODD HOWELL is awarded solely in Petitioner with Respondent having supervised visitation, supervision to be provided by a mutally agreed upon family member.

2. Respondent shall provide major medical and dental insurance for the minor children of the parties. The Petitioner shall pay 100% of any uninsured medical and dental expenses.

3. Respondent shall pay child support in the amount of FIVE HUNDRED EIGHTY FIVE DOLLARS ($585.00) per month, calculated as follows: income for Respondent is based upon a monthly gross income of $2,325.80 and a monthly income for Petitioner of $486.00 for disability; basic child support is $644.00 with an additional education expense of $60.00 (tutoring) for a basic figure of $704.00; Respondent's percentage is 83%. Said child support payments shall be made through the Clerk of the Superior Court and a Wage Assignment shall issue. Respondent shall also pay the $13.80 annual handling fee through the Clerk of the Superior Court.

Further, Respondent shall pay child support payments directly to the Clerk of the Superior Court in the amount of $585.00 per month, commencing the first day of the first month following entry of this Decree, until such time as the Wage Assignment is entered.

Further, the parties shall exchange financial information every twelve (12) months to adjust the amount of child support. This information includes, but is not limited to, copies of pay stubs, income tax returns and W-2 forms.

4. The Respondent shall be entitled to claim the children as exemptions for income tax purposes until the Court orders otherwise.

5. Respondent will pay all visitations expenses for himself and the minor children.

IT IS FURTHER ORDERED as follows:

1. Respondent shall pay the balance of $250.00 for Petitioner's attorney's fees as ordered on February 20, 1990 directly to Petitioner's attorney. Otherwise, each party is to be responsible for their own attorney's fees and costs.

2. Respondent shall pay to Petitioner as and for spousal maintenance the amount of $150.00 per month until his retirement begins in October, 1992 unless she remarries before this date.

DONE IN OPEN COURT THIS 16 day of April, 1991.

/ss/

COMMISSIONER OF THE SUPERIOR COURT

RECORD AND BRIEFS

No. 15-1031

FILED
MAR 11 2016
OFFICE OF THE CLERK

In The

Supreme Court of the United States

JOHN HOWELL,

Petitioner,

v.

SANDRA HOWELL,

Respondent.

On Petition For Writ Of Certiorari To The Arizona Supreme Court

BRIEF IN OPPOSITION

CHARLES W. WIRKEN
Counsel of Record
GUST ROSENFELD, PLC
1 E. Washington
Suite 1600
Phoenix, AZ 85004-2553
(602) 257-7959
cwirken@gustlaw.com
Counsel for Respondent

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTION PRESENTED

Petitioner and Respondent agreed before their divorce that Respondent was entitled to fifty percent of Petitioner's military retirement pay, and the decree so awarded. Petitioner later elected to receive veterans' disability benefits and waived an equal amount of retirement pay, consequently reducing Respondent's vested interest. Does the Uniformed Services Former Spouses' Protection Act preempt the state court's enforcement or modification of a stipulated decree in order to indemnify Respondent and avoid depriving her of vested property without due process?

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STATUTES INVOLVED

In addition to the provisions set out in the Petition (Pet. 1-3), the following provisions are also involved.

U.S. CONST. amend. V

No person shall . . . be deprived of . . . property, without due process of law. . . .

ARIZ. CONST. art. II, § 4

No person shall be deprived of . . . property without due process of law.

10 U.S.C. § 1408(e)(1)

The total amount of disposable retired pay of a member payable under all court orders pursuant to subsection (c) may not exceed 50 percent of such disposable retired pay.

10 U.S.C. § 1408(e)(4)(B)

Notwithstanding any other provision of law, the total amount of the disposable retired pay of a member payable by the Secretary concerned under all court orders pursuant to this section and all legal processes pursuant to section 459 of the Social Security Act (42 U.S.C. 659) with respect to a member may not exceed 65 percent of the amount of the retired pay payable to such member that is considered

under section 462 of the Social Security Act (42 U.S.C. 662) to be remuneration for employment that is payable by the United States.

10 U.S.C. § 1408(e)(6)

Nothing in this section shall be construed to relieve a member of liability for the payment of alimony, child support, or other payments required by a court order on the grounds that payments made out of disposable retired pay under this section have been made in the maximum amount permitted under paragraph (1) or subparagraph (B) of paragraph (4). Any such unsatisfied obligation of a member may be enforced by any means available under law other than the means provided under this section in any case in which the maximum amount permitted under paragraph (1) has been paid and under section 459 of the Social Security Act (42 U.S.C. 659) in any case in which the maximum amount permitted under subparagraph (B) of paragraph (4) has been paid.

A.R.S. § 25-317

A. To promote amicable settlement of disputes between parties to a marriage attendant on . . . the dissolution of their marriage, the parties may enter into a written separation agreement containing provisions for disposition of any property. . . .

B. In a proceeding for dissolution of marriage . . . the terms of the separation agreement . . . are

binding on the court unless it finds . . . that the separation agreement is unfair.

* * * *

A.R.S. § 25-318(A)

In a proceeding for dissolution of the marriage . . . the court shall . . . divide the community, joint tenancy and other property held in common equitably, though not necessarily in kind. . . . * * *

A.R.S. § 25-318.01

In making a disposition of property pursuant to 25-318 or 25-327, a court shall not do any of the following:

1. Consider any federal disability benefits awarded to a veteran for service-connected disabilities pursuant to 10 United States Code section 1413a or 38 Unites States Code chapter 11.

2. Indemnify the veteran's spouse or former spouse for any prejudgment or postjudgment waiver or reduction in military retired or retainer pay related to receipt of the disability benefits.

3. Award any other income or property of the veteran to the veteran's spouse or former spouse for any prejudgment or postjudgment waiver or reduction in military retired or retainer pay related to receipt of the disability benefits.

A.R.S. § 25-325(A)

A decree of dissolution of marriage . . . is final when entered, subject to the right of appeal. * * *

STATEMENT OF THE CASE

Petitioner and Respondent agreed before entry of their Decree of Dissolution of Marriage that Respondent was entitled to fifty percent of Petitioner's forthcoming military retirement pay (MRP):

> The parties entered into an agreement on April 16, 1991. The agreement provided, "[Respondent] is entitled to and is awarded as her sole and separate property FIFTY PERCENT (50%) of [Petitioner's] military retirement when it begins through a direct pay order."

Pet. App. 24a, 32a.

The Decree entered on April 16, 1991 tracks the settlement agreement verbatim:

> [Respondent] is entitled to and is awarded as her sole and separate property FIFTY PERCENT (50%) of [Petitioner's] military retirement when it begins through a direct pay order.

Pet. App. 41a.

In 2004, Petitioner voluntarily petitioned for Veterans Administration disability benefits. Pet. App. 24a, 32a. He received a retroactive disability rating of

20% in 2005. *Id.* Because federal law prohibits duplication of MRP and disability benefits, *see* 38 U.S.C. §§ 5304-5305, Petitioner elected to waive MRP in an amount equal to his disability benefits of approximately $250 per month. Pet. App. 24a, 33a. Consequently, the amount of Respondent's share of MRP was reduced by one-half of the amount Petitioner waived. *Id.*

In 2013, Respondent petitioned to enforce the Decree's award of MRP. Pet. App. 25a, 31a. Petitioner agreed that Respondent had a vested interest in fifty percent of the MRP, and acknowledged he could not, under Arizona case law, unilaterally divest Respondent's interest in the MRP. Pet. App. 35a. Petitioner argued, however, that a post-decree enactment, A.R.S. § 25-318.01, overruled prior case law by prohibiting the modification of a property division to indemnify a veteran's spouse for a reduction in MRP related to the veteran's receipt of disability benefits. *Id.*

The family court found:

- Respondent "had a vested property right in 50% of [Petitioner's] military retirement." Pet. App. 35a.
- "[Respondent] was dependent on and expecting this money." Pet. App. 24a, 33a.
- A.R.S. § 25-318.01 cannot be applied retroactively to vested property rights. Pet. App. 37a.
- Petitioner "had an obligation to pay [Respondent] 50% of the military retirement as ordered in the decree." Pet. App. 37a.

- Petitioner "violated the decree by unilaterally decreasing the retirement pay in favor of disability pay." Pet. App. 36a.
- "[Petitioner] owed [Respondent] 50% of the military retirement regardless of the disability rating as his election unilaterally alters a vested property right." Pet. App. 37a.

Accordingly, the family court ordered that Petitioner "is responsible for ensuring [Respondent] receive her full 50% of the military retirement without regard for the disability." Pet. App. 28a.

On appeal, Petitioner argued for the first time that the Uniformed Service Former Spouses' Protection Act (USFSPA) preempted the family court's authority to order Petitioner to indemnify Respondent. The Arizona Court of Appeals deemed the issue waived, but the Arizona Supreme Court considered it.

Observing that "[Respondent] was awarded fifty percent of the MRP years before [Petitioner] unilaterally elected to receive disability pay in lieu of a portion of MRP" and that the "Order did not divide the MRP subject to the VA waiver, order [Petitioner] to rescind the waiver, or direct him to pay any amount to [Respondent] from his disability pay," the Arizona Supreme Court concluded that "the family court did not violate the USFSPA or *Mansell* [*v. Mansell*, 490 U.S. 581 (1989)] because it did not treat the MRP subject to the VA waiver as divisible property." Pet. App. 7a.

Citing *Mansell*'s recognition that "domestic relations are preeminently matters of state law," and the corresponding requirement for positive evidence of preemption by direct enactment, the Arizona Supreme Court concluded:

> Nothing in the USFSPA directly prohibits a state court from ordering a veteran who makes a post-decree VA waiver to reimburse the ex-spouse for reducing his or her share of MRP. Absent such direct prohibition, we decline to find federal prohibition.

Pet. App. 8a.

The Arizona Supreme Court therefore held "that federal law does not preempt the family court's authority to order a retired veteran to indemnify an ex-spouse for a reduction in MRP caused by a post-decree waiver of MRP made to obtain disability benefits." Pet. App. 14a.

Lastly, the Arizona Supreme Court ruled "[Respondent] had a vested right to receive future distributions of her share of MRP unencumbered by any adjustments initiated by [Petitioner]." Pet. App. 12a. In that circumstance, the inapplicability of A.R.S. § 25-318.01 was affirmed. The Arizona Supreme Court held that the statute "cannot be applied to prohibit the [family] court from entering an indemnification order in these circumstances if the ex-spouse's share of MRP vested as a property right before the statute's enactment." Pet. App. 14a. Otherwise, the statute would "diminish [Respondent's] vested

property right in violation of the due process guarantee." *Id.*[1]

REASONS FOR DENYING THE PETITION

I. A square and definite conflict does not exist among the highest state courts.

The Petition creates a mere mirage of a conflict. When each of the supposedly conflicting decisions is approached, the illusion of a conflict vanishes.

A. *Youngbluth v. Youngbluth*, 188 Vt. 53 (2010), rests primarily on the interpretation of its property division order and state law regarding the finality of such orders. It does not hold that "under federal law, a state court may *not* require a veteran to indemnify a former spouse for the reduction in MRP effected by a post-divorce disability waiver." Pet. 17.

Wife was awarded a percentage of Husband's MRP and sought a larger percentage after the dollar amount was reduced by his election of disability benefits. Wife's attempt to enforce the order by changing its percentage was rejected:

> [W]e hold that, under the plain language of the original property division order and under settled law that state courts cannot grant a former spouse an interest in a military

[1] The Arizona Supreme Court did not hold A.R.S. § 25-318.01 unconstitutional, as Petitioner reports. Pet. 10.

> servicemember's disability benefits, the original property division order does not allow wife to now receive a greater percentage of husband's disposable retirement benefits.

Id. at 60.

The holding was explicitly narrow:

> We therefore leave for another day the question of whether a military servicemember's actions shifting retirement benefits to disability benefits can ever trigger relief from judgment under Rule 60(b). Our decision today applies only to situations where a trial court uses an enforcement proceeding to adjust a former spouse's percentage of a military servicemember's disposable retirement benefits.

Id. at 60-61.

> [W]e hold that the trial court erred when it used an enforcement proceeding to increase wife's percentage of husband's disposable retirement benefits. Our holding today is a narrow one. We express no view on whether a former spouse in another case could receive an increased share of a military servicemember's disposable retirement benefits either through an indemnity provision in the original property division order or through meeting the standard in Rule 60(b) for relief from judgment. We hold only that in this case an enforcement proceeding cannot

> provide the mechanism for this type of adjustment.

Id. at 73.

Noteworthy also is that there was no property settlement agreement in *Youngbluth*, the opinion did not discuss whether wife had a vested interest in husband's MRP, and it took no position on indemnification for waived MRP. Thus, *Youngbluth* does not squarely conflict.

B. *Mallard v. Burkart*, 95 So.3d 1264 (Miss. 2012), is merely a case following *Mansell*'s holding that disability benefits are not divisible. The trial court found that "[wife's] interest in [husband's] total retirement pay, *including his disability benefits*, had vested at the time of the entry of the final judgment of divorce. . . ." *Id.* at 1268 (emphasis added). Accordingly, it was "determined that [wife] was entitled to forty percent of the disability benefits" that husband elected after divorce to receive. *Id.* at 1266.

The Supreme Court of Mississippi stated the same issue as in *Mansell* – "whether federal law preempts state law, thus precluding state courts from treating as property divisible upon divorce, military retirement pay waived by the military spouse in order to receive military [veterans'] disability benefits." *Id.* at 1268. Needless to say, the court followed the holding of *Mansell*.

Because the case does not discuss the propriety of an indemnification order, it does not conflict.

C. *Ex parte Billeck*, 777 So.2d 105 (Ala. 2000), involved an impermissible assignment of disability benefits as alimony. Pursuant to the parties' agreement, the divorce judgment ordered husband "to pay to Wife his monthly U.S. Army retirement check" as alimony. After he was declared partially disabled and the amount of MRP paid to wife was reduced, "she requested the trial court to order the husband to pay her his monthly veteran's disability benefits in addition to his military retirement benefits, as periodic alimony." *Id.* at 107. The court did so, ordering husband to pay "'all of his military retirement pay . . . from whatever source, be it defined as military retirement pay or VA disability,'" and further stating that "'[f]or the purpose of this Order, VA disability [benefits] shall be considered as part of military retirement benefits.'" *Id.* at 109, quoting order.

The Supreme Court of Alabama held that the "order directly contradicts the plain language of [10 U.S.C.] § 1408 and the *Mansell* decision which provides that veteran's disability benefits are not considered disposable military retirement pay subject to division or assignment." *Id.*

Billeck took no position on whether a spouse has a vested interest in pre-waiver MRP, or on the use of indemnification orders. Consequently, it is not in conflict.

D. *Clauson v. Clauson*, 831 P.2d 1257 (Alaska 1992), is uniquely distinctive. Alaska, an equitable distribution state, requires by statute that the trial

court "'fairly allocate the economic effect of divorce' based, *inter alia*, on the earning capacity and financial condition of the parties involved." *Id.* at 1259. The Clausons divorced and "'the division of [their] property [was] found to be fair and equitable.'" *Id.* That division included a fractional share of husband's MRP to wife. Husband later waived all of his MRP for disability benefits. Wife moved to amend the decree, arguing that husband's waiver of MRP destroyed the fair and equitable division of property. *Id.* at 1259-60. Rather than reconsidering the division of property, "the trial judge simply ordered [husband] to pay an amount equivalent to [wife's] share of the waived retirement pension as if the waiver had never occurred." *Id.* at 1259.

The Alaska Supreme Court considered two issues: whether the circumstances justified relief from the decree's original division of property, and whether federal law precluded such relief to compensate for the loss of waived MRP. After concluding that the circumstances were sufficiently extraordinary to justify relief, the court held that "federal law does not preclude our courts from considering, when equitably allocating property upon divorce, the economic consequences of a decision to waive military retirement pay in order to receive disability pay." *Id.* at 1264.

Thus, the court remanded to the trial court to redistribute the marital estate under the new circumstances of husband's waiver, if wife's motion was found to be timely. In doing so, the court disapproved redistribution by "simply shift[ing] an amount of

property equivalent to the waived retirement pay from the military spouse's side of the ledger to the other spouse's side," as was done in granting wife's motion to amend. *Id.* at 1264.

Given its unique procedural setting, *Clauson* does not take a side on the pertinent issues – the nature of the ex-spouse's interest in a pre-waiver share of MRP, and the permissibility of relief other than redistributing the marital assets, *e.g.*, a "make up" order. Thus, it presents no conflict.

E. Neither of the holdings in the consolidated appeals in *Kramer v. Kramer*, 252 Neb. 526 (1997), creates a conflict. After entry of an amended decree awarding wife a percentage of husband's MRP, he was awarded disability benefits retroactive to a date before the original decree. Husband therefore sought to recover the percentage of his disability benefits paid to wife. Wife in turn applied to modify the decree to increase the amount of alimony because the parties' relative economic circumstances had changed.

The trial court granted husband's motion for summary judgment over wife's nominal opposition, and the Supreme Court of Nebraska affirmed, holding that "[t]o permit [wife] to retain this overpayment would have the effect of awarding her a percentage of the husband's disability benefits, which is prohibited by [U.S.C.] § 1408(a)(4)(B) and (c)(1)." *Id.* at 540-41. In other words, the court simply obeyed the express language of the statute, but did not decide any issue presented in the instant case so as to create a conflict.

As to wife's application, the court stated the issue as "whether the USFSPA as interpreted in *Mansell* . . . precluded the district court from considering a former spouse's military disability benefits and corresponding waiver of retirement pension benefits in determining whether there had been a material change in circumstances justifying modification of the decree." *Id.* at 542. After recognizing that *Mansell* prohibited the inclusion of disability benefits in the marital estate, the court held that "it may consider such benefits and the corresponding waiver of retirement benefits . . . in determining whether there has been a material change in circumstances which would justify modification of an alimony award to a former spouse who was previously awarded a fixed percentage of the retirement pension benefits." *Id.* at 546. That holding does not decide an issue relevant to this case, let alone create a conflict.

II. The decision below is correct.

A. The USFSPA does not preclude state court indemnification orders that do not divide disability benefits.

The Uniformed Services Former Spouses' Protection Act authorizes state courts to treat a veteran's disposable retired pay as the property of the veteran and his spouse in accordance with state law. 10 U.S.C. § 1408(c)(1). Accordingly, Arizona, a community property state, can treat disposable retired pay as community property and divide it "equitably" in a proceeding for dissolution of marriage or legal separation.

A.R.S. § 25-318(A); *In re Marriage of Howell*, 238 Ariz. 407, 412, ¶ 21 (2015).

"Disposable retired pay" is defined as the veteran's total retired pay less certain deductions such as amounts deducted as a result of a waiver of retired pay required by law in order to receive Veterans Administration disability benefits. 10 U.S.C. § 1408(a)(4). Thus, the USFSPA does not authorize state courts to treat disability benefits as community property. *Mansell v. Mansell*, 490 U.S. 581, 589 (1989). Consequently, if before divorce a veteran waives retired pay to receive disability benefits, a state court cannot thereafter divide the retired pay that has been waived. *Id.* at 594-95.

Conversely, as the Arizona Supreme Court noted, "[n]othing in the USFSPA directly prohibits a state court from ordering a veteran who makes a post-decree VA waiver to reimburse the ex-spouse for reducing his or her share of MRP." Pet. App. at 8a.

A direct prohibition is necessary to preemption of the states' authority to remedy a veteran's unilateral reduction of an ex-spouse's vested interest in property. As this Court has said: "Because domestic relations are preeminently matters of state law, we have consistently recognized that Congress, when it passes general legislation, rarely intends to displace state authority in this area. Thus we have held that we will not find preemption absent evidence that it is positively required by direct enactment." *Mansell*, 490 U.S. at 587 (citations and quote omitted).

Because the prohibition in the USFSPA is expressly limited and does not positively preempt relief to rectify a post-decree dilution of an ex-spouse's vested share of MRP, it does not preclude state court indemnification orders that do not divide disability benefits.

B. The USFSPA cannot divest a vested interest in military retirement pay.

Petitioner conceded below that Respondent had a vested interest in fifty percent of the MRP, and acknowledged he could not, under Arizona case law, unilaterally divest Respondent's interest in the MRP. Pet. App. 35a. The Arizona Supreme Court agreed, stating, "[Respondent] had a vested right to receive future distributions of her share of MRP unencumbered by any adjustments initiated by [Petitioner]." Pet. App. 12a.

"The legislative history does not indicate the reason for Congress' decision to shelter from community property law that portion of military retirement pay waived to receive veterans' disability payments." *Mansell*, 490 U.S. at 592. Whatever the reason, it cannot extend to MRP that has been divided, and thus vested in the non-military spouse, before any waiver. Because the USFSPA lacks any positive provision compelling its application to that conclusion, any court that would so apply the Act would thereby deprive Respondent of her property without due process.

C. The USFSPA does not preempt agreements between spouses to divide military retirement pay.

Petitioner and Respondent expressly agreed she was entitled to fifty percent of his MRP. Pet. App. 24a, 32a. That agreement was made before any waiver of MRP to receive disability benefits.

The USFSPA does not positively preclude such an agreement or a decree implementing it. And the usual presumption against preemption in the domain of family law, *Hillman v. Maretta*, 133 S.Ct. 1943, 1950 (2013), is especially strong because settlement agreements are to be encouraged in domestic relations cases. Indeed, such agreements are expressly promoted by statute in Arizona. A.R.S. § 25-317(A). Plus they are binding on the court if they are fair. A.R.S. § 25-317(B).

Neither does *Mansell* suggest that freedom to contract to divide MRP is prohibited by the Act. Although the parties therein agreed to a division of "total military retirement pay" including disability benefits, *Mansell*'s holding that state courts cannot divide disability benefits stops there. It does not limit the parties' ability to make an agreement to divide MRP that is properly divisible.

An agreement to divide MRP is ineffective only if it includes disability benefits, as did the agreements in *Mansell* and *Mallard v. Burkart*, *supra*. The agreement in this case does not.

Given that fact and that "[t]he regulation of domestic relations is traditionally the domain of state law," *Hillman v. Maretta*, 133 S.Ct. at 1950, the USFSPA does not preempt the parties' agreement, its incorporation in the Decree, or the family court's 2014 Order to ensure that Respondent receive the benefit of her bargain.

D. State courts must have flexibility to fashion equitable remedies appropriate to each case.

Petitioner sought disability benefits some fourteen years after his divorce from Respondent and the division of their marital estate. Respondent did not move to enforce the decree for eight years more. At either point in time, it was likely impractical, if not impossible, to equitably redistribute the estate in kind to account for Petitioner's unilateral waiver of MRP awarded to Respondent. The only practical remedy available to the family court was a monetary indemnification order.

The indemnification order herein making Petitioner "responsible for ensuring [Respondent] receive her full 50% of the military retirement without regard for the disability," Pet. App. 28a, does not divide or otherwise directly affect Petitioner's disability benefits. As the Arizona Supreme Court noted, the "Order did not divide the MRP subject to the VA waiver, order [Petitioner] to rescind the waiver, or direct him

to pay any amount to [Respondent] from his disability pay." Pet. App. 7a.

Petitioner can simply indemnify Respondent from his other assets. No finding was made that he has no other assets, and he did not make that argument. Nor could he because he has at least his own share of the MRP.

Finally, an order to indemnify Respondent from Petitioner's share of MRP is not prohibited by the USFSPA:

> Nothing in this section [10 U.S.C. 1408] shall be construed to relieve a member of liability for . . . payments required by a court order on the grounds that payments made out of disposable retired pay under this section have been made in the maximum amount permitted under paragraph (1) or subparagraph (B) of paragraph (4). [50 or 65 percent of disposable retired pay, respectively.] Any such unsatisfied obligation of a member may be enforced by any means available under law other than the means provided under this section in any case in which the maximum amount permitted under paragraph (1) has been paid and under section 459 of the Social Security Act (42 U.S.C. 659) in any case in which the maximum amount permitted under subparagraph (B) of paragraph (4) has been paid.

10 U.S.C. § 1408(e)(6). That "savings clause" defeats "any inference that the [Act's] federal direct payments

mechanism displaced the authority of state courts to divide and garnish property not covered by the mechanism." *Mansell*, 490 U.S. at 590. Thus, a state court order can properly be directed at MRP not being paid directly to Respondent. In other words, MRP paid to Petitioner. "'Nothing' in the Former Spouses' Protection Act relieves military retirees of liability under such law if they possess other assets equal to the value of the former spouse's share of gross retirement pay." *Mansell*, 490 U.S. at 601 (O'Connor, J., dissenting.)

CONCLUSION

This is not a preemption case. It is instead a breach of contract, due process, and equity case. No compelling conflict exists and the Arizona Supreme Court's decision is correct. The Petition should be denied.

Respectfully submitted,

CHARLES W. WIRKEN
Counsel of Record
GUST ROSENFELD, PLC
1 E. Washington
Suite 1600
Phoenix, AZ 85004-2553
(602) 257-7959
cwirken@gustlaw.com
Counsel for Respondent

RECORD AND BRIEFS

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IN THE
Supreme Court of the United States

JOHN HOWELL,
Petitioner,

v.

SANDRA HOWELL,
Respondent.

On Petition for a Writ of Certiorari to the Arizona Supreme Court

PETITIONER'S REPLY BRIEF

KEITH BERKSHIRE
BERKSHIRE LAW OFFICE
5050 N. 40th St.,
Suite 340
Phoenix, AZ 85018
(602) 396-7669

ADAM G. UNIKOWSKY
Counsel of Record
BENJAMIN M. EIDELSON*
JENNER & BLOCK LLP
1099 New York Ave., NW
Suite 900
Washington, DC 20001
(202) 639-6000
aunikowsky@jenner.com

*Not admitted in D.C.; supervised by principals of the Firm.

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This case presents a scenario that has now arisen in ten different state supreme courts. The divorce decree of Sandra and John Howell awarded a fixed percentage of John's military retirement pay (MRP) to Sandra. After the divorce, John waived a portion of his MRP in order to receive disability pay, causing Sandra's monthly payments to decrease. The divorce court ordered John to reimburse Sandra for the portion of the MRP that he waived. On appeal, John argued that the divorce court's order was preempted by the federal Uniformed Services Former Spouses' Protection Act (USFSPA), 10 U.S.C. § 1408, which prohibits the division of disability pay in a divorce decree. *See Mansell v. Mansell*, 490 U.S. 581 (1989).

The Arizona Supreme Court rejected John's federal preemption argument. But, echoing the observation of numerous other courts, it recognized that "[c]ourts in other jurisdictions have divided on the issue." Pet. App. 6a. Indeed, on identical facts, four other state supreme courts have that federal law does not preempt such an order, and five state supreme courts have held that federal law does preempt such an order. Respondent's arguments that the conflicting cases can be reconciled are incorrect. The Court should grant certiorari to resolve the conflict.

On the merits, the decision below is wrong. The order upheld by the decision below is substantively identical to the order that this Court held was preempted in *Mansell*. The Arizona Supreme Court, echoed by Respondent, attempted to distinguish *Mansell* on the ground that that the divorce court's order did not *directly* award Respondent half of

Petitioner's disability pay, but instead required Petitioner to pay a sum *identical to* half of his disability pay. But that reasoning is both economically untenable and irreconcilable with this Court's precedents. The decision below violates federal law and should be reversed.

I. The Decision Below Conflicts With Decisions With Five Other State Supreme Courts.

The decision below is consistent with decisions from the highest courts of Maine, Tennessee, Massachusetts, and Rhode Island. Pet. 11-16. But it conflicts with decisions from the highest courts of Vermont, Mississippi, Alabama, Alaska, and Nebraska. Pet. 16-25. As shown below, the facts and procedural posture of the latter set of cases were identical to the facts and procedural posture here, yet those courts held that federal preemption applied. Respondent's efforts to reconcile the conflicting cases are not successful.

1. *Youngbluth v. Youngbluth*, 6 A.3d 677 (Vt. 2010). The divorce decree of Elisabeth and Bruce Youngbluth specified that Elisabeth would receive a fixed percentage of Bruce's MRP. Pet. 17-18. After Bruce waived a portion of his MRP to receive disability benefits, Elisabeth sought to modify the decree to receive the same monthly payments she was previously getting. *Id.* The trial court granted Elisabeth's request, and the Vermont Supreme Court reversed. After acknowledging that "[s]tate courts are split on this issue" without any "clear majority viewpoint," 6 A.3d at 684, 687, the Vermont Supreme Court held that federal law preempted such a modification to the

decree—in direct conflict with the decision below. Pet. 17-18.

Respondent asserts that *Youngbluth* "rests primarily on the interpretation of its property division order and state law regarding the finality of such orders." BIO 8. This is not credible. The *Youngbluth* court made explicitly clear that its decision was based on federal law: "[A] decision by the United States Supreme Court on a matter of *federal law* is binding upon the state courts," and "*federal law* is very clear that the former spouse has no right to those amounts of retirement benefits which the former military servicemember waived so he could receive disability benefits." *Youngbluth*, 6 A.3d at 685, 690 (internal quotation marks and alterations omitted; emphasis added).

Respondent also asserts: "Noteworthy also is that there was no property settlement agreement in *Youngbluth*, the opinion did not discuss whether wife had a vested interest in husband's MRP, and it took no position on indemnification for waived MRP." BIO 10. Taking those statements one by one:

- "*There was no property settlement agreement in Youngbluth.*" Respondent does not explain why this was "noteworthy." Moreover, there apparently *was* a property settlement in *Youngbluth*. 6 A.3d at 691 (Johnson, J., concurring) ("These retirement benefits were treated as marital property for purposes of the divorce settlement").

- *"The opinion did not discuss whether wife had a vested interest in husband's MRP."* Respondent seems to be referring to the Arizona Supreme Court's *state law* analysis, in which it characterized Respondent as holding "vested property rights." Pet. App. 8a-14a. This characterization played no role whatsoever in the court's *federal law* analysis. Pet. App. 5a-8a. And for good reason: "vested property rights" could not possibly affect the federal preemption analysis. Federal law preempts conflicting state law; thus, if federal law prohibited the modification of the decree, then the characterization of Sandra's interests for state-law purposes could not possibly change that result. Neither the court below, nor any other court that has considered this issue, has ever suggested that a state-law "vested property rights" doctrine could affect federal preemption.

- *"It took no position on indemnification for waived MRP."* This is simply wrong. In *Youngbluth*, the trial court increased Bruce's monthly payments by an amount "equat[ing] to the ... monthly payment that the trial court had in mind when it decided the initial allocation." 6 A.3d at 680. That is *identical* to what the trial court did here. Pet. App. 4a (trial court's order directed that John be "responsible for ensuring Sandra receives her full 50% of the military retirement

without regard for the disability" (alterations omitted)). There is simply no way to reconcile *Youngbluth* with this case.[1]

2. *Mallard v. Burkart*, 95 So. 3d 1264 (Miss. 2012). The divorce decree of Tonya Burkart and James Mallard specified that Burkart would receive a fixed percentage of Mallard's MRP. Pet. 18-20. After Mallard waived a portion of his MRP to receive disability benefits, Burkart sought to modify the decree to receive the same monthly payments she was previously getting. *Id.* The trial court granted Burkart's request, and the Mississippi Supreme Court reversed. Observing that "[t]here is a split of authority on this question, and no clear majority view," 95 So. 3d at 1271, the court held that federal law prohibited the modification: "state law is preempted by federal law, and thus, state courts are precluded from ordering distribution of military disability benefits contrary to federal law." *Id.* at 1272.

Respondent avers: "Because the case does not discuss the propriety of an indemnification order, it does not conflict." BIO 10. This is inexplicable. The divorce court concluded that "Burkart's interest in Mallard's total retirement pay, including his disability benefits, had vested at the time of the entry of the final

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[1] If Respondent is making an inartful reference to the Vermont Supreme Court's observation that the divorce *decree* contained no indemnification provision, 6 A.3d at 689, that would not resolve the conflict, because the Arizona Supreme Court *also* held that the divorce decree in this case contains no indemnification provision. Pet. 32. Indeed, that is one reason this case is such a *good* vehicle. *Id.*

judgment of divorce," and that Mallard was accordingly "liable to Burkart" for *"the difference between what Burkart would have received had Mallard not gone on disability and what she actually had received."* 95 So. 3d at 1268 (emphasis added). Again, that is *identical* to the order in this case, Pet. App. 4a, yet the court reached the precise opposite conclusion on Mallard's federal preemption argument.

3. *Ex parte Billeck*, 777 So. 2d 105 (Ala. 2000). The divorce decree of Hellene and Edwin Billeck awarded Edwin's MRP to Hellene. Pet. 20-21. After Edwin waived a portion of his MRP to receive disability benefits, Hellene sought to modify the decree to receive the same monthly payments she was previously getting. *Id.* The trial court granted Hellene's request, and the Alabama Supreme Court reversed. Rejecting Hellene's reliance on "other state courts" which had "circumvented the mandates of the *Mansell* decision," it held that *Mansell* "specifically limits the state courts" from issuing such an order, and the order therefore "violate[s] federal law." 777 So. 2d at 108-09.

According to Respondent, "*Billeck* took no position on whether a spouse has a vested interest in pre-waived MRP, or on the use of indemnification orders." BIO 11. As previously explained, however, Respondent cannot explain away the conflict by pointing to the Arizona Supreme Court's state-law "vested rights" analysis. *Supra*, at 4. And *Billeck* plainly did reject "indemnification orders." The trial judge's order required Edwin to pay Hellene the sum of money she originally was obtaining under the decree, precisely like the trial judge's order here. The

Alabama Supreme Court held that this order was preempted: "The state courts have reasoned that, as long as the trial court does not order the husband directly to pay his veteran's disability benefits to the wife, the trial court does not violate § 1408. This reasoning is flawed. ... [T]he trial court essentially is awarding the wife a portion of those veteran's disability benefits; and in doing so the trial court is violating federal law." 777 So. 2d at 108-09. The reasoning that the Alabama Supreme Court characterized as "flawed" was precisely the reasoning applied by the decision below. Pet. App. 7a (holding that divorce court's order was not preempted because it "did not divide the MRP subject to the VA waiver, order John to rescind the waiver, or direct him to pay any amount to Sandra from his disability pay").

4. *Clauson v. Clauson*, 831 P.2d 1257 (Alaska 1992). The divorce decree of Dorothy and James Clauson specified that Dorothy would receive a fixed portion of James's MRP. Pet. 21-23. After James waived his MRP to receive disability benefits, Dorothy sought to modify the decree to receive the same monthly payments she was previously getting. *Id.* The trial court granted Dorothy's request, and the Alaska Supreme Court reversed. It explained that *Mansell* "unequivocal[ly]" bars state courts from "equitably divid[ing] veterans' disability benefits received in place of waived retirement pay." 831 P.2d at 1262. And it held that although divorce courts may generally take account of changed circumstances after a veteran becomes disabled, the order under review sought to "regain the status quo as if the *Mansell* decision did not

exist," and its "effect ... was to divide retirement benefits that have been waived to receive disability benefits in direct contravention of the holding in *Mansell*." *Id.* at 1264.

Respondent attributes the result in *Clauson* to the "unique procedural setting," BIO 13, but does not establish any "unique" aspect of the "procedural setting" that would distinguish *Clauson* from this case. Respondent also asserts that "*Clauson* does not take a side on the pertinent issues," such as the permissibility of a "'make up' order." *Id.* This is just not true. The order in *Clauson* "simply replaced direct federal garnishment of James' retirement benefits with a state order to pay," 831 P.2d at 1264, which is an exact characterization of the order in this case. *Clauson*'s holding that this order violated federal law directly conflicts with the decision below.

5. *Kramer v. Kramer*, 567 N.W.2d 100 (Neb. 1997). The divorce decree of Kathleen and Kenneth Kramer specified that Kathleen would receive a fixed portion of Kenneth's MRP. Pet. 23-25. The divorce decree was entered in 1991; Kenneth was declared disabled in 1994 and waived his MRP to receive disability payments, retroactive back to 1992. *Id.*

For the period between 1992 and 1994, Kathleen argued she was entitled to receive the amounts specified in the 1991 decree; Kenneth argued that this would violate federal law. The court agreed with Kenneth and ordered Kathleen to reimburse him, holding that "[t]o permit her to retain this overpayment would have the effect of awarding her a percentage of the husband's disability benefits, which is

prohibited by [the USFSPA]." 567 N.W.2d at 110. For the period after 1994, the court explicitly adopted *Clauson*'s legal standard, including its prohibition on "redistribution" in response to a post-divorce conversion to disability compensation. *Id.* at 111.

Respondent simply asserts, without explanation, that *Kramer*'s holdings did not create a conflict. BIO 13, 14. To the contrary, as the Petition explains, the conflict with the decision below is obvious. Pet. 23-25. For the 1992-94 period, the court held that under *Mansell*, when a veteran converts money from MRP to disability compensation, federal law *requires* his ex-spouse's MRP payments to decrease. This is the opposite of the decision below. And for the period after 1994, the court explicitly adopted the *Clauson* standard, which also directly conflicts with the decision below. *Supra*, at 7-8.

* * *

In short, as courts have repeatedly acknowledged, there is a conflict of authority on the application of the USFSPA to the circumstances of this case. Respondent offers no intelligible theory on how the conflicting cases can be reconciled.

Respondent notably does not dispute Petitioner's contention that the issue presented here is recurring and important. Pet. 27-29. Nor does she dispute that this case is a uniquely strong vehicle. Pet. 29-33. This case therefore meets all of this Court's criteria for granting certiorari.

II. The Decision Below Is Wrong.

The decision below is directly contrary to *Mansell*. Respondent apparently concedes the central premise of the Petition: the order approved by the court below is economically identical to the order that this Court held was preempted in *Mansell*. Pet. 33-34. Respondent instead focuses on the form rather than the substance of the order: she argues that the order is not preempted because it is not directed *directly* at Petitioner's disability payment, but instead orders Petitioner to pay an *equivalent amount*. BIO 14-16. Yet as the Petition explained, this Court has squarely rejected this precise theory. Pet. 36 (discussing *Wissner v. Wissner*, 338 U.S. 655 (1950)). Respondent does not cite, much less distinguish, *Wissner*.

Respondent relies on *Hillman v. Maretta*, 133 S. Ct. 1943 (2013) (BIO 17), but *Hillman* strongly supports Petitioner's position. In *Hillman*, a federal statute directed that a federal employee's life insurance proceeds be directed to his named beneficiary; a Virginia statute provided that if the employee's marital status had changed, but he did not update his beneficiary designation, the employee's surviving spouse could sue the named beneficiary for the proceeds. *Id.* at 1947. The Court unanimously held that the Virginia statute was preempted. The Court found that the Virginia statute "conflicts with Congress' purposes and objectives," because Congress had directed that the named beneficiary receive the money, and that money therefore "cannot be allocated to another person by operation of state law." *Id.* at 1950, 1953. The same reasoning applies here. Under

Mansell, federal law requires that a divorced veteran retain his disability benefits; that sum of money cannot be redirected to his ex-spouse by operation of state law.

Respondent also cites the Arizona Supreme Court's holding that she possessed "vested right[s]" under state law. BIO 16. But she does not grapple with Petitioner's argument that a state cannot evade federal law by creating a "vested right" to an asset that federal law prohibits states from dividing. Pet. 34.

Equally unpersuasive is Respondent's assertion that the USFSPA "does not preempt agreements between spouses to divide military retirement pay," and that the decision below vindicates "freedom to contract." BIO 17-18. As the court below expressly stated, the divorce court's order did *not* enforce the original agreed-upon terms of the decree; rather, it *modified* the decree. Pet. 32. A court does not uphold the "freedom to contract" by unilaterally modifying the terms of a contract.[2]

Respondent's gestures toward the federal Due Process Clause, BIO 1, 16, 20, do not amount to a

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[2] Respondent attempts to get some mileage from Petitioner's acknowledgment that Respondent has a vested interest in his *MRP*. BIO 16. But Petitioner has always paid—and continues to pay—the amount of MRP required by the decree. Petitioner certainly has never conceded that Respondent has a vested interest to receive an *additional* payment corresponding to *waived* MRP, which are the payments at issue in this case. Pet. App. 11a (explaining the parties' positions). In any event, the Arizona Supreme Court's "vested rights" analysis was directed only to Petitioner's state-law argument, not his federal preemption argument.

persuasive argument. Respondent cites no case law, and offers no coherent explanation, supporting her theory that enforcing the original agreed-upon terms of the decree would violate the federal Constitution. Neither the Arizona Supreme Court,[3] nor any other court to have addressed this issue, has ever suggested that the application of the USFSPA would violate Due Process. At any rate, Respondent's ill-explained due process argument is no basis for denying certiorari.

Finally, Respondent's contorted argument regarding the USFSPA's savings clause (BIO 18-20) should be rejected. As the Court made clear in *Mansell*, that provision serves the purpose of preserving state courts' power to divide non-disability pay; it does not preserve state courts' power to divide property that is the economic equivalent of disability pay. 490 U.S. at 590. Tellingly, Respondent cites the dissenting opinion's interpretation of the savings clause (BIO 20), which did not persuade the majority of the Court.

CONCLUSION

The petition for writ of certiorari should be granted.

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[3] The Arizona Supreme Court did conduct a *state* due process analysis in addressing Petitioner's state-law claims, Pet. App. 13a-14a, but did not suggest that Petitioner's federal preemption argument might present any federal due process question.

Respectfully submitted,

KEITH BERKSHIRE
BERKSHIRE LAW OFFICE
5050 N. 40th St.,
Suite 340
Phoenix, AZ 85018
(602) 396-7669

ADAM G. UNIKOWSKY
Counsel of Record
BENJAMIN M. EIDELSON*
JENNER & BLOCK LLP
1099 New York Ave., NW
Suite 900
Washington, DC 20001
(202) 639-6000
aunikowsky@jenner.com

*Not admitted in D.C.; supervised by principals of the Firm.

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RECORD AND BRIEFS

Supreme Court, U.S.
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No. 15-1031

In the Supreme Court of the United States

JOHN HOWELL, PETITIONER

v.

SANDRA HOWELL

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ARIZONA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

IAN HEATH GERSHENGORN
Acting Solicitor General
Counsel of Record
BENJAMIN C. MIZER
Principal Deputy Assistant Attorney General
MALCOLM L. STEWART
Deputy Solicitor General
ILANA H. EISENSTEIN
Assistant to the Solicitor General
ALISA B. KLEIN
KATHERINE TWOMEY ALLEN
Attorneys
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

When the parties divorced and their property was divided, petitioner agreed that, going forward, he would pay respondent 50% of his military retirement pay each month. Petitioner later waived a portion of his retirement pay in favor of veteran's disability benefits, resulting in a reduction of the monthly payments made to respondent. The family court ordered petitioner to indemnify respondent for the amount of that reduction. The question presented is as follows:

Whether the state court's order violated the Uniformed Services Former Spouses' Protection Act, 10 U.S.C. 1408, as interpreted in *Mansell* v. *Mansell*, 490 U.S. 581 (1989).

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In the Supreme Court of the United States

No. 15-1031

JOHN HOWELL, PETITIONER

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SANDRA HOWELL

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ARIZONA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

INTEREST OF THE UNITED STATES

This brief is filed in response to the Court's order inviting the Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be granted.

STATEMENT

1. a. This case concerns two types of veterans' benefits: retirement pay and disability benefits. Members of the military who have served the requisite number of years may retire and receive retirement pay. 10 U.S.C. 3911 *et seq.* (U.S. Army); 10 U.S.C. 6321 *et seq.* (U.S. Navy and U.S. Marine Corps); 10 U.S.C. 8911 *et seq.* (U.S. Air Force). In addition, veterans who become partially or totally disabled as a result of their military service may be eligible for disability benefits. 38 U.S.C. 1110 (wartime disability); 38 U.S.C. 1131 (peacetime disability). In general, however, a military retiree may receive disability benefits

only to the extent that he or she waives a corresponding amount of retirement pay. 38 U.S.C. 5305. Such waivers are common because disability benefits, unlike retirement pay, are exempt from taxation. 38 U.S.C. 5301(a); see *Mansell* v. *Mansell*, 490 U.S. 581, 583-584 (1989).

b. In *McCarty* v. *McCarty*, 453 U.S. 210 (1981), this Court held that federal law preempts state courts from treating a service member's retirement pay as community property divisible between a service member and a former spouse upon divorce. *Id.* at 232-235.

Congress responded to *McCarty* by enacting the Uniformed Services Former Spouses' Protection Act (USFSPA), 10 U.S.C. 1408. The USFSPA authorizes a state court to "treat disposable retired pay * * * either as property solely of the member or as property of the member and his spouse in accordance with the law of the jurisdiction of such court." 10 U.S.C. 1408(c)(1). The statute defines "disposable retired pay" as "the total monthly retired pay to which a member is entitled," less certain amounts, including the amount waived "in order to receive compensation under * * * title 38"—*i.e.*, the amount waived to receive disability benefits. 10 U.S.C. 1408(a)(4)(B).

In *Mansell*, this Court construed the USFSPA to foreclose state courts from treating as community property the portion of military retirement pay that a veteran has waived in order to receive disability benefits. See 490 U.S. at 588-589. The veteran in *Mansell* had waived a portion of his retirement pay, and had begun to receive disability benefits, before the parties were divorced. See *id.* at 585. The settlement agreement between the parties specifically provided for the

division of the former military member's "total military retirement pay, including that portion of retirement pay waived so that [he] could receive disability benefits." *Id.* at 586.

While recognizing that "domestic relations are preeminently matters of state law," and that Congress "rarely intends to displace state authority in this area," the Court found that the case before it "present[ed] one of those rare instances where Congress has directly and specifically legislated in the area of domestic relations." *Mansell*, 490 U.S. at 587. The Court held that, under the USFSPA's "plain and precise language, state courts have been granted the authority to treat *disposable* retired pay as community property," but "have not been granted the authority to treat *total* retired pay as community property." *Id.* at 589 (emphases added). The Court concluded that the USFSPA "does not grant state courts the power to treat as property divisible upon divorce military retirement pay that has been waived to receive veterans' disability benefits." *Id.* at 594-595.[1]

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[1] The veteran in *Mansell* argued that the state court's division of his total retired pay violated not only the USFSPA, but also the anti-attachment provision applicable to veterans' disability benefits. Under that provision, disability benefits "shall not be assignable except to the extent specifically authorized by law, and * * * shall be exempt from the claim of creditors, and shall not be liable to attachment, levy, or seizure by or under any legal or equitable process whatever, either before or after receipt by the beneficiary." 38 U.S.C. 5301(a)(1) (formerly 38 U.S.C. 3101(a) (1988)). In light of its holding that the USFSPA precludes the division of retirement pay waived in favor of disability benefits, the Court in *Mansell* found it unnecessary to address whether the anti-attachment provision would independently preclude such a divi-

2. In 1991, petitioner John Howell and respondent Sandra Howell divorced. Pet. App. 2a. "Pursuant to the parties' agreement," the decree of dissolution issued by the family court provided that "[respondent] is entitled to and is awarded as her sole and separate property FIFTY PERCENT (50%) of [petitioner's] military retirement when it begins through a direct pay order." *Id.* at 2a, 41a. The following year, petitioner retired from the Air Force, and the parties began to receive military retirement pay. *Id.* at 2a-3a. In 2005, petitioner qualified for a 20% disability rating that resulted from a service-connected shoulder injury, and he elected to waive a corresponding portion of his military retirement pay in order to receive disability benefits. *Id.* at 3a. That waiver had the effect of reducing respondent's monthly share of petitioner's retirement pay by approximately $125 per month. *Ibid.*; see *id.* at 33a.

Respondent asked the family court to enforce the decree's division of military retirement pay, and she sought an arrearage for the reduced amounts she had received. Pet. App. 31a-32a. Petitioner moved to dismiss on the basis of Arizona Revised Statute Annotated § 25-318.01 (Supp. 2015), which was enacted in 2010 and provides that a court making a disposition of property shall not "[i]ndemnify the veteran's spouse or former spouse for any prejudgment or postjudgment waiver or reduction in military retired or retainer pay related to receipt of the disability benefits." Pet. App. 31a-32a. The family court granted respondent's motion to enforce, holding that she had a vested property right in 50% of the original military retire-

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sion. See 490 U.S. at 587 n.6. The anti-attachment provision is not at issue in this case.

ment-pay amount, and that petitioner had "violated the decree by unilaterally decreasing the retirement pay in favor of disability." *Id.* at 36a; see *id.* at 34a-36a.

3. The Court of Appeals of Arizona, Division 2, affirmed the family court's order on the ground that Arizona Revised Statute Annotated § 25-318.01 (Supp. 2015) does not apply to post-decree enforcement proceedings. Pet. App. 15a-21a.[2]

4. The Supreme Court of Arizona affirmed, albeit on different state-law grounds than the court of appeals. Pet. App. 1a-14a.

a. The Supreme Court of Arizona first addressed petitioner's contention that the USFSPA preempts the family court's indemnification order. The court held that federal law would prohibit the family court from dividing military retirement pay "that has been waived to obtain disability benefits either at the time of the decree or thereafter." Pet. App. 7a. The court explained, however, that although the family court's indemnification order had the effect of "diminish[ing] the overall income increase [petitioner] received when he elected [to waive retirement pay,]" the indemnification order did not treat petitioner's disability pay "as divisible property" and did not "order [petitioner] to rescind the waiver, or direct him to pay any amount to

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[2] Petitioner did not raise a federal preemption defense in the trial court, raising this argument for the first time in the Court of Appeals of Arizona. Pet. App. 20a-21a. The court of appeals declined to consider the argument on the ground that it had been waived below. *Ibid.* The Supreme Court of Arizona, however, decided as a matter of discretion to entertain and resolve petitioner's argument that the USFSPA preempted the family court's indemnification order. *Id.* at 5a.

[respondent] from his disability pay." *Id.* at 7a-8a. The court concluded that "[n]othing in the USFSPA directly prohibits a state court from ordering a veteran who makes a post-decree VA waiver to reimburse the ex-spouse for reducing his or her share of [military retirement pay]." *Id.* at 8a.

b. The Supreme Court of Arizona then addressed the question whether the family court's indemnification order was precluded by Section 25-318.01. Pet. App. 8a-14a. The court found that Section 25-318.01 applies to the modification, but not the enforcement, of existing dissolution decrees. *Id.* at 10a. The court held that the indemnification order in this case "modifies rather than enforces the dissolution decree's property disposition terms, and § 25-318.01 therefore applies," because the 1991 dissolution decree "did not require [petitioner] to indemnify [respondent] for her loss of [military retirement pay]." *Ibid.*

The Supreme Court of Arizona further held, however, that application of Arizona Revised Statute Annotated § 25-318.01 (Supp. 2015) to prevent modification of the divorce decree at issue here, which was entered before Section 25-318.01's enactment, would violate the due process provision of the Arizona Constitution, Ariz. Const. Art. 2, § 4, because it would deprive respondent of a vested property right. Pet. App. 11a-14a. The court explained that, although the 1991 divorce decree did not expressly require indemnification, its effect under Arizona law was to "create[] an immediate right to future payment of fifty percent of the [military retirement pay], including cost-of-living increases, earned during the marriage." *Id.* at 13a. The court stated that, under Arizona law, "[o]ne spouse cannot invoke a condition solely within his or

her control to defeat the community interest of the other spouse." *Ibid.* (citing *Koelsch* v. *Koelsch*, 713 P.2d 1234, 1239 (Ariz. 1986)). The court found that, "[b]y electing the VA waiver, [petitioner] did precisely that by essentially converting [respondent's military retirement pay] share," and that the family court's indemnification order "restored [respondent's] share of community assets." *Ibid.* The Supreme Court of Arizona concluded that "the family court correctly refused to apply § 25-318.01 to these facts" because "application of § 25-318.01 to prohibit the court from remedying the deprivation would diminish [respondent's] vested property right in violation of the [Arizona constitution's] due process guarantee." *Id.* at 14a.

DISCUSSION

The Supreme Court of Arizona upheld a family-court order that required petitioner to indemnify respondent for the economic loss that respondent suffered when petitioner waived a portion of his military retirement pay in order to receive disability benefits. Petitioner contends (Pet. 33-37) that the court's decision violates the USFSPA, as interpreted by this Court in *Mansell* v. *Mansell*, 490 U.S. 581 (1989). He further asserts (Pet. 11-27) that state courts are divided on the question whether the USFSPA preempts state-court indemnification orders in these circumstances.

The Supreme Court of Arizona correctly rejected petitioner's contention that the USFSPA barred the family court from requiring petitioner to indemnify respondent. The USFSPA does not preclude a state court from ordering indemnification of a former spouse who, under the applicable state law, obtained a vested interest to military retirement pay and later

sought to avoid a reduction in her share due to the veteran's post-divorce waiver of retirement pay in favor of disability benefits. We agree with petitioner, however, that state supreme courts have expressed sufficiently divergent views on this issue that the Court's review is warranted to clarify the USFSPA's preemptive scope. The petition for a writ of certiorari therefore should be granted.

A. The USFSPA Does Not Preempt A State-Court Indemnification Order That Is Based On A Former Spouse's State-Law Vested Right To A Share Of A Veteran's Military Retirement Pay

At the time the parties in *Mansell* were divorced, the veteran spouse had already retired from the military and had waived a portion of his retirement pay in order to receive disability benefits. See 490 U.S. at 585. The divorce decree provided that the veteran would pay his ex-wife "50 percent of his total military retirement pay, including that portion of retirement pay waived so that [the veteran] could receive disability." *Id.* at 586. The Court held that the USFSPA prohibits state courts from "treat[ing] as property divisible upon divorce military retirement pay that has been waived to receive veterans' disability benefits." *Id.* at 595. The Court explained that the USFSPA authorizes a State to treat only "disposable retired * * * pay" as community property, while "specifically defin[ing]" that term to exclude retirement pay waived in favor of disability benefits. *Id.* at 588-589 (quoting 10 U.S.C. 1408(a)(4)(B) and (c)(1) (1988)).

In this case, by contrast, petitioner's waiver of retirement pay occurred well *after* the divorce decree and division of marital property. The parties were divorced in 1991; petitioner retired from the military

in 1992; and petitioner waived a portion of his retirement pay in 2005. See Pet. App. 2a-3a. Neither the original dissolution decree (which long predated petitioner's waiver of retirement pay and election of disability benefits) nor the 2014 indemnification order purported to treat petitioner's waived retirement pay as community property.

Rather, in requiring petitioner to indemnify respondent for the economic loss that respondent had suffered as a result of the waiver, the family court and the Supreme Court of Arizona both explained that the original dissolution decree had given respondent a vested right to 50% of petitioner's full retirement benefits; that petitioner had violated his state-law obligations by unilaterally decreasing the amount to which respondent was entitled; and that an indemnification order was an appropriate remedy for that breach. See Pet. App. 35a-37a (family-court decision); *id.* at 12a-14a (Supreme Court of Arizona decision). The USFSPA did not prohibit that remedy because the indemnification order "did not divide the [military retirement pay] subject to the VA waiver, order [petitioner] to rescind the waiver, or direct him to pay any amount to [respondent] from his disability pay." *Id.* at 7a. As the Supreme Court of Arizona recognized, "[n]othing in the USFSPA directly prohibits a state court from ordering a veteran who makes a post-decree VA waiver to reimburse the ex-spouse for reducing his or her share of [military retirement pay]." *Id.* at 8a.

Petitioner argues (Pet. 33-34) that the indemnification order in this case had substantially the same economic effect as an order that treated waived retirement pay as divisible community property, and

that the indemnification order must therefore be preempted as well. The *Mansell* Court recognized, however, that "domestic relations are preeminently matters of state law," that Congress "rarely intends to displace state authority in this area" when it passes general legislation, and that this Court therefore "will not find pre-emption absent evidence that it is 'positively required by direct enactment.'" 490 U.S. at 587 (quoting *Hisquierdo* v. *Hisquierdo*, 439 U.S. 572, 581 (1979), in turn quoting *Wetmore* v. *Markoe*, 196 U.S. 68, 77 (1904)). The Court concluded that *Mansell* "present[ed] one of those rare instances where Congress has directly and specifically legislated in the area of domestic relations," *ibid.*, because the USFSPA directly addresses the authority of state courts to treat military retirement pay as community property and specifically excludes from that authorization "military retirement pay waived in order to receive veterans' disability payments," *id.* at 589. By contrast, the USFSPA does not "directly and specifically" address the interpretation and enforcement of property-settlement agreements that are entered *before* any waiver has occurred and that guarantee the former spouse a fixed proportion of military retirement pay.

There is also no indication that the money petitioner was ordered to pay would come out of his disability benefits. The family court did not "direct [petitioner] to pay any amount to [respondent] from his disability pay." Pet. App. 7a. And while "requiring [petitioner] to reimburse [respondent] diminishes the overall income increase he received when he elected the VA waiver," *id.* at 7a-8a, petitioner was still receiving approximately $610 per month in disposable retire-

ment pay and was ordered to pay respondent only an additional $127.50 per month (adjusted for cost of living). *Id.* at 3a.

B. State Courts Of Last Resort Have Divided On The Question Whether Indemnification Orders Like The One At Issue Here Are Preempted By The USFSPA

A number of state courts of last resort have addressed fact patterns similar to the circumstances here, where the divorce decree entitled a veteran's ex-spouse to a specified percentage of the veteran's military retirement pay, the veteran thereafter waived a portion of his retirement pay in order to obtain disability benefits, and the ex-spouse sought compensation for the economic loss she suffered as a result of that waiver. The highest courts of six States—Maine, Massachusetts, Nevada, Rhode Island, South Dakota, and Tennessee—have approved indemnification orders in those circumstances, rejecting arguments that such orders were preempted by the USFSPA.[3] The

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[3] See, *e.g.*, *Black* v. *Black*, 842 A.2d 1280, 1285 (Me. 2004) ("[T]he USFSPA does not limit the authority of a state court to grant post-judgment relief when military retirement pay previously divided by a divorce judgment is converted to disability pay."); *Krapf* v. *Krapf*, 786 N.E.2d 318, 326 (Mass. 2003) ("The judgment in this case does not divide the defendant's * * * disability benefits in contravention of the *Mansell* decision; the judgment merely enforced the defendant's contractual obligation to his former wife, which he may satisfy from any of his resources."); *Shelton* v. *Shelton*, 78 P.3d 507, 509 (Nev. 2003) ("Although states cannot divide disability payments as community property, states are not preempted * * * from enforcing contracts [that divide retirement benefits] * * * , even when disability pay is involved."), cert. denied, 541 U.S. 960 (2004); *Resare* v. *Resare*, 908 A.2d 1006, 1010 (R.I. 2006) ("[T]he Family Court did not in any way divide [the veteran's] *disability* benefit in contravention of *Mansell*, but

highest courts of two other States (Alaska and Florida) have held that, if the original divorce decree contains an indemnification provision or directs the veteran not to take unilateral action that reduces his spouse's share of retirement benefits, that provision is valid and enforceable through an indemnification order if the veteran subsequently waives military retirement pay.[4]

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simply held [the veteran] to the terms of the original [property settlement agreement]."); *Hisgen* v. *Hisgen*, 554 N.W.2d 494, 498 (S.D. 1996) (*Mansell* "does not preclude state courts from interpreting divorce settlements to allow a spouse to receive property or money equivalent to [the agreed-upon percentage of] a veteran's retirement entitlement[s]" if the veteran subsequently waives a portion of the entitlements in favor of disability pay.); *Johnson* v. *Johnson*, 37 S.W.3d 892, 897-898 (Tenn. 2001) ("[W]hen a[] [marital dissolution agreement] divides military retirement benefits, the non-military spouse obtains a vested interest in his or her portion of those benefits as of the date of the court's decree. * * * [A]n act of the military spouse [that unilaterally diminishes the vested interest] * * * constitutes an impermissible modification of a division of marital property.").

[4] See *Glover* v. *Ranney*, 314 P.3d 535, 543 (Alaska 2013) (holding that the trial court in entering a divorce decree "may expressly order [a service member] not to reduce his disposable retired pay and require [the service member] to indemnify [a former spouse] for any amounts by which her payments are reduced below the amount set on the date [an] amended qualified order is entered.") (brackets in original) (quoting *Young* v. *Lowery*, 221 P.3d 1006, 1012-1013 (Alaska 2009)); *Abernethy* v. *Fishkin*, 699 So. 2d 235, 240 (Fla. 1997) ("[W]hile federal law prohibits the division of disability benefits, it does not prohibit spouses from entering into a property settlement agreement that awards the non-military spouse a set portion of the military spouse's retirement pay" and includes an "indemnification provision[] ensuring such payments.").

Petitioner contends (Reply Br. 2-9, Pet. 16-27) that the Supreme Court of Arizona's decision conflicts with decisions of the supreme courts of Vermont (Pet. 17-18), Mississippi (Pet. 18-20), Alabama (Pet. 20-21); Alaska (Pet. 21-22), and Nebraska (Pet. 23-25). Only the Supreme Court of Mississippi has explicitly rejected the "vested rights" rationale for post-waiver indemnification that the courts below invoked in this case. Those decisions appear, however, to adopt a view of the USFSPA's preemptive scope that is significantly broader than that applied by the Supreme Court of Arizona in this case, and by other state courts of last resort. This Court's review is warranted in light of the disuniformity among state supreme courts and the frequency with which USFSPA preemption issues arise.[5]

1. In *Mallard* v. *Burkart*, 95 So. 3d 1264 (Miss. 2012), the divorce decree awarded the non-veteran spouse a specified percentage (40%) of the veteran's "disposable military retired pay," the veteran subsequently waived a portion of his retirement pay in order to receive disability benefits, and the non-veteran spouse sought relief in the trial court. *Id.* at 1266-1267. "[T]he chancellor held that [the veteran] unilaterally had breached the settlement by going on disability and denying any portion of the disability benefits to [his ex-wife]." *Id.* at 1267. The chancellor

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[5] Petitioner also observes (Pet. 26 & n.6) that state intermediate appellate courts are divided on the propriety of indemnification orders in circumstances like those presented here. Such a division, standing alone, is not ordinarily a sufficient ground for this Court's review. See Sup. Ct. R. 10(b). The existence of these decisions, however, provides further evidence that the question presented here recurs with significant frequency.

further held that the ex-wife's "interest in [the veteran's] total retirement pay, including his disability benefits, had vested at the time of the entry of the final judgment of divorce." *Id.* at 1268. The chancellor ordered the veteran to pay his ex-wife "the difference between what [the ex-wife] would have received had [the veteran] not gone on disability and what she actually had received, plus six percent interest." *Ibid.*

The trial court in *Mallard* thus awarded indemnification to the non-veteran spouse on the same vested-rights rationale that the Supreme Court of Arizona relied on in this case. The Supreme Court of Mississippi reversed, holding that the trial court's order was in substance an impermissible attempt to order distribution of the veteran's disability benefits. See *Mallard*, 95 So. 3d at 1268-1273. In so holding, the court relied unambiguously on the preemptive force of the USFSPA. See *id.* at 1268 (framing the dispositive issue as "whether federal law preempts state law"); *id.* at 1273 (reversing the chancellor's indemnification order on the ground that "[f]ederal law preempts state law"). The decision in *Mallard* thus squarely conflicts with the Supreme Court of Arizona's ruling in this case.

2. *Youngbluth* v. *Youngbluth*, 6 A.3d 677 (Vt. 2010), involved a similar sequence of events, in which the division-of-property agreement granted the wife a 19.81% share of her veteran husband's military "retirement pay." *Id.* at 679. The husband subsequently waived a portion of his military retirement pay in favor of disability benefits, thus reducing the monthly amount his former wife received. *Ibid.* At the wife's request, the trial court then increased the wife's share of her husband's retirement pay "from 19.81% to

22.4%, based upon expert testimony that 22.4% of the smaller number would equate to the roughly $700 monthly payment that the trial court had in mind when it decided the initial allocation." *Id.* at 680.

The Supreme Court of Vermont held that this increase was impermissible. The court explained that, "[g]iven that *Mansell* held that state courts are without power to divide disability benefits in a property division order," the original division-of-property order's reference to "retirement pay" "cannot be read to have granted wife an interest in husband's disability benefits." *Youngbluth*, 6 A.3d at 683. In holding that the trial court could not increase the wife's percentage of the veteran's retirement pay in order to offset the economic effect of the waiver, the Supreme Court of Vermont relied in part on principles of USFSPA preemption, see *id.* at 684-685 & n.2, 687, and in part on state-law decisions emphasizing the need for finality of judgments, see *id.* at 686.

The Supreme Court of Vermont did not suggest that, but for the USFSPA's preemptive effect, Vermont law would have barred the veteran from taking unilateral action that reduced the value of his former wife's 19.81% share. The difference in outcomes between this case and *Youngbluth* therefore might plausibly be attributed to the Supreme Court of Arizona's reliance on a state-law rule that may have no analogue in the law of Vermont. Compare Pet. App. 13a (holding that, under Arizona law, "[o]ne spouse cannot invoke a condition solely within his or her control to defeat the community interest of the other spouse"), with *Youngbluth*, 6 A.3d at 686 (suggesting that a similar argument "ignore[s] the critical point that finality is about ending litigation," and stating that the

veteran husband in that case "was well within his rights to apply for disability benefits"). But the opinion in *Youngbluth* also suggests that the USFSPA would have preempted the application of any such state-law rule in the specific context of a post-divorce waiver of military retirement pay. Thus, the Supreme Court of Vermont stated that, under *Mansell*, non-veteran former spouses "can, without their consent, be denied a fair share of their ex-spouse's military retirement pay simply because [the military service-member] elects to increase his after-tax income by converting a portion of that pay into disability benefits." *Id.* at 684 (brackets in original) (quoting *Mansell*, 490 U.S. at 595 (O'Connor, J., dissenting)). And the Court's reliance on federal preemption principles is underscored by its statement that, "[r]ather than joining those courts that have found creative solutions around *Mansell*, we recognize that * * * a decision by the United States Supreme Court on a matter of federal law is binding upon the state courts." *Id.* at 684-685 (citation and internal quotation marks omitted).

3. In *Ex parte Billeck*, 777 So. 2d 105 (Ala. 2000), the veteran had agreed in the divorce settlement to pay his ex-wife alimony in the amount of "his monthly U.S. Army retirement check." *Id.* at 106 (citation omitted). Ten years later, the veteran waived a portion of his retirement pay in favor of disability benefits. *Id.* at 107. The family court "ordered the husband to pay the wife 'all of his military retirement pay received as a result of his United States Army military service from whatever source, be it defined as military retirement pay or VA disability.'" *Id.* at 109.

The Supreme Court of Alabama held that the family court's order was inconsistent with the USFSPA. *Billeck*, 777 So. 2d at 108-109. The court stated:

> The *Mansell* decision and [Section] 1408 clearly manifest the intent of the federal law that a retiree's veteran's disability benefits be protected from division or assignment. Alabama courts and other state courts have circumvented the mandates of the *Mansell* decision and [Section] 1408 by allowing trial courts to *consider* veteran's disability benefits in awarding alimony.

Id. at 108. The trial court's order in *Billeck*, which expressly directed the veteran to pay over his disability benefits (rather than simply to indemnify his ex-wife for the economic loss caused by his partial waiver of military retirement pay), would be improper even under the Supreme Court of Arizona's view of USFSPA preemption. See Pet. App. 7a ("We agree that the family court cannot divide [military retirement pay] that has been waived to obtain disability benefits either at the time of the decree or thereafter."). But the Supreme Court of Alabama's determination that a veteran's receipt of disability benefits cannot even be *considered* in determining an appropriate alimony award reflects a particularly expansive view of USFSPA preemption.

4. In *Clauson* v. *Clauson*, 831 P.2d 1257 (Alaska 1992), divorcing spouses entered into a stipulated property settlement under which the wife was to receive 13/40 of her husband's military pension. *Id.* at 1259. The veteran subsequently "elected to waive all of his military retirement pension in order to receive disability benefits." *Ibid.* Based on that change in circumstances, his ex-wife sought a modification of the

divorce decree, and the trial court ordered her ex-husband to pay her the same amount ($168 per month) that she had been receiving before the waiver occurred. See *id.* at 1259-1260.

The Supreme Court of Alaska held that, although the USFSPA precludes state courts from dividing veterans' disability benefits between divorced spouses, see *Clauson*, 831 P.2d at 1262, it does not preclude state courts from taking a veteran's waiver of retirement pay into account in determining what division of property or level of spousal support is appropriate, see *id.* at 1262-1264. The court further held, however, that it would be "unacceptable" for "trial courts to simply shift an amount of property equivalent to the waived retirement pay from the military spouse's side of the ledger to the other spouse's side," an approach that the court viewed as substantially equivalent to dividing the disability benefits themselves. *Id.* at 1264. That reasoning seems inconsistent with the indemnification remedy approved by the Supreme Court of Arizona in this case, the purpose and effect of which was to place respondent in the same economic position she would have occupied if no waiver of military retirement pay had occurred.

More recently, however, the Supreme Court of Alaska upheld a trial-court order, entered as part of a divorce decree, that required a veteran to indemnify his former spouse "for any subsequent unilateral actions to decrease the total monthly pension payout amounts," including a waiver of retirement pay. *Glover* v. *Ranney*, 314 P.3d 535, 543 (2013); see note 4, *supra*. The court thus indicated that a veteran who waives military retirement pay may be required to compensate his former spouse for the precise amount

of her resulting economic loss, so long as such an obligation was made part of the original divorce decree. See notes 7-9, *infra*.

5. In *Kramer* v. *Kramer*, 567 N.W.2d 100 (Neb. 1997), the divorce decree awarded the wife a percentage of the veteran-husband's military pension. *Id.* at 105. Several years later, the husband waived a portion of his military retirement pay in order to receive disability benefits, *ibid.*, and his ex-wife sought increased alimony to compensate for the reduction of her share of the military retirement pay, *id.* at 106.

The Supreme Court of Nebraska held that the husband's "waiver of retirement pension benefits" effected a "substantial and material change in the relative economic circumstances of the parties which would justify an increase in the amount of alimony which the husband is obligated to pay the wife in the absence of evidence that her income from other sources has increased." *Kramer*, 567 N.W.2d at 113.[6] Relying on the Supreme Court of Alaska's decision in *Clauson*, however, the court stated that its "holding does not permit the district court to treat service-connected disability benefits as divisible marital property in form or substance." *Ibid.* That caveat appears to endorse the *Clauson* court's view that, although a trial court may consider the economic effects of a veteran's waiver in deciding whether to modify a divorce decree, it may not "simply shift an amount of property equivalent to the waived retirement pay from the military spouse's side of the ledger to the other spouse's side." *Id.* at 111 (quoting *Clauson*, 831 P.2d at 1264).

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[6] Accord *Womack* v. *Womack*, 818 S.W.2d 958, 959 (Ark. 1991) (trial court may "t[ake] note of the [veteran spouse's] disability benefits" in making an award of alimony).

6. State supreme courts have thus adopted a variety of responses to the question whether a disposition-of-property order issued at the time of divorce may subsequently be modified to account for the economic impact of a veteran's post-divorce waiver of military retirement pay and election of disability benefits. The Supreme Court of Alabama has held that such a waiver cannot even be considered in determining whether modification of the decree is appropriate. Some courts have overturned or cautioned against modification orders that would restore to the non-veteran spouse the precise level of monthly payments that she had received before the waiver occurred.[7] And several other courts, including the Supreme Court of Arizona in this case, have approved indemnification remedies that are specifically designed to place the non-veteran spouse in the economic position she would have occupied but for the veteran's waiver of military retirement pay.[8]

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[7] Some state courts that have disapproved the use of after-the-fact indemnification-type remedies have reserved the question whether the USFSPA preemption analysis might be different if the trial court had included an indemnification provision as part of the original divorce decree. See *Youngbluth*, 6 A.3d at 687, 689; see also *Billeck*, 777 So. 2d at 109; *Mallard*, 95 So. 3d at 1272 (quoting *Youngbluth*).

[8] In Arizona, the issue presented has been resolved by Arizona Revised Statute Annotated § 25-318.01 (Supp. 2015) for divorce decrees entered after that statute's enactment date in 2010. That provision prohibits, as a matter of state law, a division of property agreement that would "[i]ndemnify the veteran's spouse or former spouse for any prejudgment or postjudgment waiver or reduction in military retired or retainer pay related to receipt of the disability benefits." Ariz. Rev. Stat. Ann. § 25-318.01(2) (Supp. 2015). Accordingly, the specific reasoning of the Supreme Court of Arizona is of diminishing prospective importance. The question

Although those divergent approaches may result in part from variations among the property-law and family-law regimes of different States, they appear largely to reflect conflicting views of the USFSPA's preemptive scope. This Court's review is warranted to clarify the extent to which disposition-of-property and spousal-support requirements may be modified to address the economic consequences of post-divorce waivers of military retirement pay. To be sure, state courts have employed a variety of mechanisms to address the economic impact on non-veteran spouses of veterans' post-divorce waivers of retirement pay, and the Court's decision in this case might not definitively resolve the legality of all such mechanisms. But the basic problem in this case recurs with sufficient frequency, and the method by which the courts below addressed it is a sufficiently common one, that this Court's resolution of the question presented here would provide helpful guidance concerning the scope of USFSPA preemption.[9]

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presented, however, remains one of recurring importance nationwide.

[9] In *Padot* v. *Padot*, 891 So. 2d 1079 (Fla. Dist. Ct. App. 2004), cert. denied, 549 U.S. 1110 (2007), the Court invited the Solicitor General to file a brief expressing the views of the United States, and the government recommended that the petition be denied. In *Padot*, the trial court had issued a Supplemental Order, in connection with the initial disposition of marital property, directing that "neither party shall take any action to reduce the other party's interest in the * * * retire[ment] pay." *Id.* at 1081. When the veteran spouse subsequently waived a portion of his military retirement pay in order to receive disability benefits, the trial court enforced the Supplemental Order by directing the veteran to pay his former wife the monthly amount she would have received if no waiver had occurred. See *ibid.* The state intermediate appellate court held that the USFSPA did not preclude that relief. See

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

IAN HEATH GERSHENGORN
Acting Solicitor General
BENJAMIN C. MIZER
Principal Deputy Assistant Attorney General
MALCOLM L. STEWART
Deputy Solicitor General
ILANA H. EISENSTEIN
Assistant to the Solicitor General
ALISA B. KLEIN
KATHERINE TWOMEY ALLEN
Attorneys

OCTOBER 2016

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id. at 1081-1084. The government's amicus brief in this Court argued that this holding was correct and that no conflict among state courts of last resort existed on the question. See U.S. Br. at 7-16, *Padot* v. *Padot*, 549 U.S. 1110 (2007) (No. 05-1076).

The government's view that a writ of certiorari should be granted in this case is not inconsistent with the analysis of the pertinent case law in our *Padot* brief. The decisions of the Supreme Courts of Vermont and Mississippi in *Youngbluth* and *Mallard* post-date the filing of the government's brief in *Padot*. In addition, state supreme courts that have disapproved the use of after-the-fact indemnification-type remedies have reserved the question whether inclusion of an indemnification provision as part of the original divorce decree might alter the preemption analysis. See note 7, *supra*. We are aware of no state-court decision that has construed the USFSPA to preclude enforcement of a *Padot*-like provision entered at the time of a divorce decree. See Pet. 31 (distinguishing cases involving such a provision from the question presented here). By contrast, state supreme courts have reached inconsistent conclusions on the question whether indemnification may be ordered in response to a veteran's post-divorce waiver of retirement pay if the original decree contained no such provision.

RECORD AND BRIEFS

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IN THE
Supreme Court of the United States

JOHN HOWELL,
Petitioner,

v.

SANDRA HOWELL,
Respondent.

On Writ of Certiorari to the Arizona Supreme Court

BRIEF OF PETITIONER

KEITH BERKSHIRE
BERKSHIRE LAW OFFICE
5050 N. 40th St.,
Suite 340
Phoenix, AZ 85018
(602) 396-7669

ADAM G. UNIKOWSKY
Counsel of Record
JENNER & BLOCK LLP
1099 New York Ave., NW
Suite 900
Washington, DC 20001
(202) 639-6000
aunikowsky@jenner.com

QUESTION PRESENTED

Whether the Uniformed Services Former Spouses' Protection Act preempts a state court's order directing a veteran to indemnify a former spouse for a reduction in the former spouse's portion of the veteran's military retirement pay, where that reduction results from the veteran's post-divorce waiver of retirement pay in order to receive compensation for a service-connected disability.

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OPINIONS BELOW

The decision of the Arizona Supreme Court (Pet. App. 1a) is reported at 361 P.3d 936. The decision of the Arizona Court of Appeals (Pet. App. 15a) is unreported but is available at 2014 WL 7236856. The decision of the Arizona Superior Court (Pet. App. 23a) is unreported.

JURISDICTION

The judgment of the Arizona Supreme Court was entered on December 2, 2015. This Court has jurisdiction under 28 U.S.C. § 1257.

STATUTES INVOLVED

The relevant provisions of the Uniformed Services Former Spouses' Protection Act, Pub. L. No. 97-252, tit. X, 96 Stat. 730 (1982), are codified at 10 U.S.C. § 1408. 10 U.S.C. § 1408(c)(1) provides:

> Subject to the limitations of this section, a court may treat disposable retired pay payable to a member for pay periods beginning after June 25, 1981, either as property solely of the member or as property of the member and his spouse in accordance with the law of the jurisdiction of such court.

10 U.S.C. § 1408(a)(4) provides, in pertinent part:

> The term "disposable retired pay" means the total monthly retired pay to which a member is entitled ... less amounts which–
>
> ...

> (B) are deducted from the retired pay of such member ... as a result of a waiver of retired pay required by law in order to receive compensation under ... title 38;[1]
>
> ...

38 U.S.C. § 5304(a)(1) provides, in pertinent part:

> Except ... to the extent that retirement pay is waived under other provisions of law, not more than one award of pension, compensation, emergency officers', regular, or reserve retirement pay ... shall be made concurrently to any person based on such person's own service ... .

38 U.S.C. § 5305 provides, in pertinent part:

> ... [A]ny person who is receiving pay pursuant to any provision of law providing retired or retirement pay to persons in the Armed Forces, ... and who would be eligible to receive pension

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[1] On December 23, 2016, the President signed legislation amending the USFSPA to specify that for purposes of calculating "disposable retired pay," the "total monthly retired pay to which a member is entitled" shall be calculated based on the member's pay grade and years of service at the time of the member's divorce, as opposed to the member's retirement. *See* National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, § 641; *infra* at 41-42. The amendments do not change the relevant text of the provisions at issue in this case; they do, however, affect the numbering of one provision. Specifically, 10 U.S.C. § 1408(a)(4)(B) will now be 10 U.S.C. § 1408(a)(4)(A)(ii). Because the U.S. Code has not yet been updated to reflect this change, Petitioner uses the former numbering scheme in this brief.

> or compensation under the laws administered by the Secretary [of Veterans Affairs] if such person were not receiving such retired or retirement pay, shall be entitled to receive such pension or compensation upon the filing by such person with the department by which such retired or retirement pay is paid of a waiver of so much of such person's retired or retirement pay as is equal in amount to such pension or compensation.

STATEMENT

A. Statutory Framework

The federal government provides a pension for members of the Armed Forces who retire after serving for a minimum period (generally twenty years). *Mansell v. Mansell*, 490 U.S. 581, 583 (1989); *see, e.g.*, 10 U.S.C. § 8911(a) (Air Force). This pension is known as Military Retirement Pay ("MRP"). The size of a veteran's pension is determined based on the veteran's length of service and rank at the time of retirement. *See, e.g.*, 10 U.S.C. § 8991 (Air Force).

Separately, veterans who suffer from service-connected disabilities are entitled to receive compensation under title 38 of the U.S. Code. *See* 38 U.S.C. §§ 1110, 1131. The amount of disability pay[2] a veteran may receive for a given disability is based on a scale that reflects "the average impairments of earning capacity resulting from such injuries in civil

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[2] Throughout this brief, the phrase "disability pay" refers to disability compensation received under title 38.

occupations." *Id.* § 1155.

In order to receive disability pay, veterans who are entitled to MRP generally must waive an equivalent portion of their MRP. *See* 38 U.S.C. §§ 5304(a)(1), 5305.[3] Veterans in that position often elect to receive disability pay because, unlike MRP, disability pay is exempt from federal, state, and local taxation. *See* 38 U.S.C. § 5301; *Mansell*, 490 U.S. at 583-84.

In *McCarty v. McCarty*, 453 U.S. 210 (1981), this Court held that federal law did not permit states to treat MRP as divisible property in divorce proceedings. There, a husband and wife had divorced while the husband was still an active-duty member of the Armed Forces. *Id.* at 216. California, where the couple was divorced, was (and still is) a "community property" state, meaning that it "treats all property earned by either spouse during the marriage as community property; each spouse is deemed to make an equal contribution to the marital enterprise, and therefore each is entitled to share equally in its assets." *Id.* Thus, in accordance with community property principles, the divorce decree ordered the husband, upon retirement, to pay his ex-wife a portion of his

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[3] In 2003, Congress provided for concurrent receipt of MRP and disability pay for veterans with service-connected disability ratings of 50 percent or greater. National Defense Authorization Act for Fiscal Year 2004, Pub. L. No. 108-136, §§ 641-642, 117 Stat. 1392, 1511-17 (2003) (codified at 10 U.S.C. §§ 1413a, 1414). Because Petitioner is only 20 percent disabled, Pet. App. 3a, that provision does not apply in this case.

MRP based on the number of years the couple was married during his military service. *Id.* at 218 (quotation marks omitted).

On appeal, this Court held that the division of MRP in the divorce decree was preempted by federal law. It explained that Congress conferred MRP as a "personal entitlement" of service members and that "Congress intended that military retired pay actually reach the beneficiary." *Id.* at 226, 228 (quotation marks omitted). Further, the Court found that states' treatment of MRP as community property had "the potential to frustrate" Congress' two objectives in enacting the military retirement pay system—"to provide for the retired service member" and "to meet the personnel management needs of the active military forces." *Id.* at 232-33. With respect to the first objective, the Court observed that the wife's asserted community property interest "promise[d] to diminish that portion of the benefit Congress ha[d] said should go to the retired service member alone" and that state courts were "not free to reduce the amounts that Congress ha[d] determined [we]re necessary for the retired member." *Id.* at 233 (quotation marks and brackets omitted). With respect to the second, the Court noted that division of MRP in divorce would "diminish[]" the "inducement for enlistment or re-enlistment" Congress had provided and would therefore "interfer[e] with the goals of encouraging orderly promotion and a youthful military." *Id.* at 234-35. The Court, however, noted in closing that Congress was free to change the law if it decided that former spouses should be afforded greater protections. *Id.* at 235-36.

Congress responded by passing the Uniformed Services Former Spouses' Protection Act (USFSPA), Pub. L. No. 97-252, tit. X, 96 Stat. 730 (1982) (codified, in relevant part, at 10 U.S.C. § 1408). The USFSPA overrode *McCarty* in part: it authorized state courts to treat MRP as divisible property, but it excluded from this authority, *inter alia*, the power to divide any portion of MRP that a veteran waives to obtain disability pay. Specifically, as relevant here, the Act provided that "a court may treat *disposable retired or retainer pay* payable to a member ... either as property solely of the member or as property of the member and his spouse," 96 Stat. at 731 (emphasis added), and it defined "disposable retired or retainer pay" as a veteran's "total monthly retired or retainer pay," minus "amounts waived in order to receive compensation under ... title 38 [*i.e.*, disability pay]," 96 Stat. at 730-31.

In *Mansell v. Mansell*, this Court held that the USFSPA "does not grant state courts the power to treat as property divisible upon divorce military retirement pay that has been waived to receive veterans' disability benefits." 490 U.S. at 594-95. There, a military retiree had waived a portion of his MRP in favor of disability pay under title 38. When he and his wife divorced in California, they entered into a property settlement that obligated the retiree to pay his wife "50 percent of his total military retirement pay, including that portion of retirement pay waived so that [he] could receive disability benefits." *Id.* at 586. The retiree later petitioned the state courts to modify the divorce decree to remove this provision, but they refused to do so. *Id.*

This Court reversed. It explained that "pre-existing federal law, as construed by [*McCarty*], completely pre-empted the application of state community property law to military retirement pay" and that "Congress could overcome the *McCarty* decision only be enacting an affirmative grant of authority giving the States the power to treat military retirement pay as community property." *Id.* at 588. It then held that although the USFSPA "affirmatively grants state courts the power to divide military retirement pay," that grant "is both precise and limited." *Id.* "[U]nder the Act's plain and precise language, state courts have been granted the authority to treat *disposable* retired pay as community property; they have not been granted the authority to treat total retired pay as community property." *Id.* at 589 (emphasis added). And, because "disposable retired pay" excludes MRP that a retiree has waived to receive disability pay, the USFSPA did not disturb the prior federal rule of non-divisibility with respect to any portion of MRP that a military retiree waives in favor of disability pay. *Id.*

Only a year after *Mansell*, Congress revisited the USFSPA's definition of "disposable retired pay." It revised the definition to include amounts withheld for federal, state, and local tax purposes and certain debts of the retiree. National Defense Authorization Act for Fiscal Year 1991, Pub. L. No. 101-510, § 555, 104 Stat. 1484, 1569–70 (1990). But Congress elected to retain, in slightly reworded form, the exclusion of waived MRP. As amended, the definition of "disposable retired pay" requires state courts to take "total monthly retired

pay" and deduct "amounts which ... are deducted from ... retired pay ... as a result of a waiver of retired pay required by law in order to receive compensation under ... title 38 [*i.e.*, disability pay]." 10 U.S.C. § 1408(a)(4)(B). The exclusion of waived MRP from the definition of divisible property remains intact today.

When it amended the USFSPA in 1990, Congress' decision to retain this exclusion was not an oversight. The House Report accompanying the legislation stated: "The USFSPA authorizes state courts to treat 'disposable retired or retainer pay' as property and defines such pay to exclude military retired pay waived in order for the retiree to receive veterans' disability and civil service benefits," as well as "amounts owed by the member to the United States, fines and forfeitures from courts-martial, federal employment taxes, and amounts withheld for income tax purposes." H.R. Rep. No. 101-665, at 279 (1990). It then noted that "the exclusion of tax withholdings and individual debts of the service member from the computation of disposable retired pay ha[d] created unfairness" and that the amendments would modify the definition of "disposable retired pay" to alleviate those concerns. *Id.* at 280. But the Report expressly noted: "Current law provisions that permit the deduction from gross retired pay of amounts waived in order to receive veterans' disability compensation ... would not be changed." *Id.*

B. Proceedings Below

In 1991, Petitioner John Howell and Respondent Sandra Howell divorced in Arizona. Like California, Arizona generally treats "[a]ll property acquired by either husband or wife during the marriage" as "the

community property of the husband and wife." Ariz. Rev. Stat. § 25-211. Relevant here, Arizona treats MRP as "a form of deferred compensation" which "belong[s] to the community." Pet. App. 12a. Consistent with that principle, the parties agreed to a divorce decree which provided that "[Respondent] is entitled to and is awarded as her sole and separate property FIFTY PERCENT (50%) of [Petitioner]'s military retirement when it begins through a direct pay order." *Id.* at 2a, 41a.[4] Petitioner retired from the Air Force in 1992 after a twenty-year career, and the parties began receiving MRP shortly thereafter. *Id.* at 2a-3a.

In 2005, the Department of Veterans Affairs (VA) determined that Petitioner suffers from degenerative joint disease in his shoulder and that this impairment qualifies as a service-connected disability. The VA estimated that Petitioner's disability reduces his earning capacity by twenty percent. *Id.* at 3a; *see* 38 U.S.C. § 1155 (explaining disability-rating system). Accordingly, he qualifies for monthly payments of tax-exempt disability pay to replace his lost earnings. Pet. App. 3a. In order to obtain this compensation, Petitioner was required to waive an equal portion of his MRP. *See* 38 U.S.C. § 5304(a)(1). He therefore executed such a waiver, effective from July 2004. Pet. App. 3a. As a consequence, the MRP payments to both Petitioner and Respondent declined.

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[4] A "direct pay order" authorizes the federal government to make payments directly to a former spouse who has been awarded a portion of a veteran's MRP. *See* 10 U.S.C. § 1408(d); *Mansell*, 490 U.S. at 585.

In 2013, Respondent brought an action to "enforce" the provision of the divorce decree regarding MRP, arguing that it entitled her to half of the full value of the MRP for which Petitioner is eligible, notwithstanding any waiver on his part. *Id.* at 3a-4a. The Arizona Superior Court agreed and ordered Petitioner to "ensur[e] [Respondent] receive[s] her full 50% of the military retirement without regard for the disability." *Id.* at 28a. The Arizona Court of Appeals affirmed. *Id.* at 21a.

The Arizona Supreme Court affirmed, rejecting Petitioner's contention that the divorce court's order was preempted by the USFSPA. *Id.* at 5a. The court acknowledged that *Mansell* barred state courts from "dividing MRP that has been waived to receive disability benefits." *Id.* at 6a (citing *Mansell*, 490 U.S. at 589). But the court stated that this case presents the distinct question of "how the family court should proceed when a veteran elects a VA waiver to receive disability benefits *after* entry of a dissolution decree, thereby reducing the ex-spouse's share of previously awarded MRP." *Id.* The court concluded that although "the family court cannot divide MRP that has been waived to obtain disability benefits either at the time of the decree or thereafter," the court was free to order Petitioner to *indemnify* Respondent for the reduction in her share of MRP. *Id.* at 7a. It stated:

> The 2014 Order did not divide the MRP subject to the VA waiver, order [Petitioner] to rescind the waiver, or direct him to pay any amount to [Respondent] from his disability pay. Under these circumstances, the family court did not

> violate the USFSPA or *Mansell* because it did not treat the MRP subject to the VA waiver as divisible property. ... Nothing in the USFSPA directly prohibits a state court from ordering a veteran who makes a post-decree VA waiver to reimburse the ex-spouse for reducing his or her share of MRP.

Id. at 7a-8a.

The court also rejected Petitioner's alternative argument under state law that the indemnification order violated Arizona Revised Statute § 25-318.01, a 2010 statute that provides that a state court "shall not" "[i]ndemnify the veteran's spouse or former spouse for any prejudgment or postjudgment waiver or reduction in military retired or retainer pay related to receipt of ... disability benefits." Pet. App. 8a-9a; *see* Ariz. Rev. Stat. § 25-318.01. The court noted that although the Arizona statute does not apply in enforcement proceedings, it does apply in actions to modify decrees, and this was such an action because the divorce court's order modified the original divorce decree. Pet. App. at 10a (explaining that "[b]ecause the decree did not require [Petitioner] to indemnify [Respondent] for her loss of MRP, the 2014 Order necessarily modified the original property disposition terms"). The court nonetheless found that the state constitution's due process guarantee precluded application of the statute in the present case. It stated that once the dissolution decree dividing MRP was finalized in 1991, Respondent had a vested property interest in one-half of Petitioner's MRP, and a subsequently enacted state statute could not deprive Respondent of a remedy for a

deprivation of that interest. *Id.* at 12a-14a.

SUMMARY OF ARGUMENT

A state law is preempted when it directly contradicts a federal statute, or when it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hillman v. Maretta*, 133 S. Ct. 1943, 1950 (2013). The divorce court's order is preempted under either of these two legal standards.

First, the divorce court's order directly contradicts the USFSPA. The USFSPA "does not grant state courts the power to treat as property divisible upon divorce military retirement pay that has been waived to receive veteran's disability benefits." *Mansell*, 490 U.S. at 594-95. In this case, the divorce court ordered Petitioner to "ensur[e] [Respondent] receive[s] her full 50% of the military retirement without regard for the disability [waiver]." Pet. App. 28a. That order constituted a division of Petitioner's waived military retirement pay. It directed Petitioner to pay Respondent an amount equal to half of his waived military retirement pay, which is the very definition of treating waived military retirement pay as divisible property.

Alternatively, the divorce court's order frustrates the purposes and objectives of Congress. Congress' purpose and objective was to ensure that divorced, disabled veterans keep all of their disability pay, even if they waive a portion of their military retirement pay in order to receive that disability pay. Yet, as a result of the divorce court's order, Petitioner must pay an

amount equal to half of his disability pay to Respondent every month. As several of this Court's family law cases have made clear, such an order is preempted because it frustrates Congress' purpose to ensure that the veteran's disability pay reach the veteran alone.

The arguments of the Arizona Supreme Court and Respondent in defense of the divorce court's order are unpersuasive. The Arizona Supreme Court attempted to distinguish *Mansell* on the ground that Petitioner's waiver occurred after the divorce, rather than before the divorce as in *Mansell*. But the USFSPA does not distinguish between pre-divorce waivers and post-divorce waivers. Nor does the USFSPA suggest that modified divorce decrees need not comply with federal law.

In addition to being irreconcilable with the statutory text, the Arizona Supreme Court's distinction between pre-divorce and post-divorce waivers makes little sense. The court's decision would strip the USFSPA's protections from any active-duty service member who gets a divorce, and would lead to arbitrary distinctions depending on the timing of the VA's decision to award disability pay.

The Arizona Supreme Court also cited the presumption against preemption as a justification for the divorce court's order. But that presumption cannot save the order. The order so clearly violates federal law that any presumption against preemption would be overcome. And, in any event, the presumption against preemption should not apply in this case. Such a presumption would be inconsistent with *Mansell*, which recognized that state law was completely preempted in

this area and that state courts could only act if Congress affirmatively *granted* them the power to do so. Such a presumption would also be inconsistent with the strong federal interest in regulating the disposition of military benefits, as well as the long history of federal legislation in this area. Finally, presuming that Congress did not intend to preempt state divorce law would be unwarranted given that the USFSPA is a statute that specifically deals with divorce.

The Arizona Supreme Court's conclusion—as part of its state-law analysis—that Respondent had a "vested right" to half of Petitioner's waived military retirement pay cannot defeat federal preemption. The whole point of *Mansell* is that federal law *prohibits* the creation of such a vested right.

Finally, at the certiorari stage, Respondent relied on the *Mansell* dissent for the proposition that the USFSPA's "saving clause" authorizes the divorce court's order. The majority opinion in *Mansell*, however, rejected Respondent's interpretation of the savings clause, and its reasoning is equally applicable here.

There is no meaningful distinction between this case and *Mansell*. The judgment of the Arizona Supreme Court should therefore be reversed.

ARGUMENT

I. THE USFSPA PREEMPTS THE DIVORCE COURT'S ORDER.

"State law is preempted to the extent of any conflict with a federal statute." *Hillman*, 133 S. Ct. at 1949-50

(quotation marks omitted). Accordingly, a state law is preempted when it directly contradicts a federal statute. *See id.* at 1950 (noting that "a conflict occurs when compliance with both federal and state regulations is impossible"). Alternatively, a state law is preempted when it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Id.* (quotation marks omitted).

In this case, the divorce court's order is preempted under either of these two legal standards. First, the divorce court's order is preempted because it divides Petitioner's waived MRP and thus directly violates 10 U.S.C. § 1408(a)(4)(B) and (c)(1). Accordingly, the Court need not even consider the application of its broader "purposes and objectives" preemption doctrine.

If the Court applies its "purposes and objectives" preemption doctrine, then this case becomes even easier. All parties agree that federal law prohibits the division of Petitioner's disability pay and would, therefore, preempt a state court order purporting to divide Petitioner's disability pay. But the divorce court's order is the exact economic equivalent of a division of Petitioner's disability pay and, if permitted to stand, would defeat Congress' purpose of ensuring that disability pay reaches the veteran alone. As this Court has held in several cases, a state family court cannot do indirectly what federal law bars it from doing directly: where a federal law bars a state family court from dividing an asset, a state family court cannot evade that federal law by issuing an order that is the economic equivalent of dividing the asset. Those cases

establish that the divorce court's order here is preempted.

A. The Divorce Court's Order Directly Violates Federal Law.

The USFSPA authorizes a divorce court to treat "disposable retired pay" as community property.[5] 10 U.S.C. § 1408(c)(1). As pertinent here, "disposable retired pay" is defined as "total monthly retired pay" minus "amounts which ... are deducted from the retired pay of such member ... as a result of a waiver of retired pay required by law in order to receive compensation under ... title 38." *Id.* § 1408(a)(4). It therefore excludes amounts waived to receive disability pay. *See* 38 U.S.C. §§ 1110, 1131 (providing compensation to veterans with service-connected disabilities); 38 U.S.C. § 5305 (requiring waiver of MRP to receive disability pay). As explained above, this Court held in *Mansell* that the USFSPA "does not grant state courts the power to treat as property divisible upon divorce military retirement pay that has been waived to

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[5] The USFSPA applies in both "community property" states, like Arizona and California, and "equitable distribution" states, which divide property according to equitable principles rather than automatically treating all property acquired during marriage as property of the community. Because Arizona is a community property state, Petitioner refers to the issue in terms of community property for the remainder of this brief, as the Court did in *Mansell*. 490 U.S. at 584 n.2 ("The language of the Act covers both community property and equitable distribution States, as does our decision today. Because this case concerns a community property State, for the sake of simplicity we refer to § 1408(c)(1) as authorizing state courts to treat 'disposable retired or retainer pay' as community property.").

receive veteran's disability benefits." 490 U.S. at 594-95; *supra*, at 6-7.

In this case, however, the divorce court divided Petitioner's waived MRP when it ordered Petitioner to "ensur[e] [Respondent] receive[s] her full 50% of the military retirement without regard for the disability [waiver]." Pet. App. 28a. It thus violated federal law.

To understand why, consider the following: In 2004, Petitioner waived $255 per month in MRP in order to start receiving an equivalent amount in disability pay from the VA. As a result, Respondent's monthly payment from the federal government representing her 50% interest in Petitioner's MRP decreased by $127.50—*i.e.*, half of $255. *Id.* at 3a. Respondent returned to the divorce court, seeking reimbursement for the $127.50 per month that she was no longer receiving from the federal government because of Petitioner's waiver. The amount of money Respondent was no longer receiving from the federal government was, by definition, one-half of the amount of MRP that Petitioner had waived to receive disability pay.

The divorce court subsequently directed Petitioner to "ensur[e] [Respondent] receive[s] her full 50% of the military retirement without regard for the disability [waiver]." *Id.* at 28a. Thus, the divorce court ordered Petitioner to pay one-half of his disposable MRP to Respondent, as well as an amount equal to one-half of his waived MRP—*i.e.*, $127.50 per month. By requiring Petitioner to pay a one-half share of his waived MRP to Respondent each month, the divorce court divided Petitioner's waived MRP.

The Arizona Supreme Court insisted that the divorce court "did not divide the MRP subject to the VA waiver" because it merely required Petitioner to "reimburse" Respondent for the MRP waiver. *Id.* at 7a. But an order dividing MRP subject to a VA waiver, and an order requiring a veteran to reimburse a spouse for half of the amount of waived MRP, are the exact same thing. When a divorce court divides MRP subject to a VA waiver, the only possible way for a divorce court to enforce such a division of property is to direct the veteran to pay the ex-spouse, out of pocket, an amount equivalent to half of the waived MRP. After all, a veteran does not receive the waived amount from the federal government and must therefore satisfy such an order out of the veteran's general assets. Thus, there is no difference whatsoever between an order dividing waived MRP and an order requiring a veteran to reimburse an ex-spouse for waived MRP.

In sum, an order directing Petitioner to ensure Respondent receives her "full 50% of the military retirement without regard for the disability [waiver]," *Id.* at 28a, is an order that divides waived MRP, in violation of the USFSPA. The Court's analysis should end there.

B. The Divorce Court's Order Conflicts with Congress' Purposes and Objectives.

Alternatively, the divorce court's order conflicts with the purposes and objectives of the USFSPA.

First, although the "legislative history does not indicate the reason for Congress' decision to shelter

from community property law that portion of military retirement pay waived to receive veterans' disability payments," *Mansell*, 490 U.S. at 592, it is beyond dispute that Congress' "purpose" and "objective" was to prevent state courts from dividing waived MRP. Thus, even if the Court concludes that there is some technical distinction between an order "dividing waived MRP" and a "reimbursement" or "indemnification" order, it should, at a minimum, hold that a reimbursement order conflicts with Congress' *purpose* of preventing state courts from dividing waived MRP. Permitting state courts to evade federal law by labeling their orders "reimbursement" or "indemnification" orders for waived MRP rather than "division" orders of waived MRP—when those two types of orders accomplish the same result—would defeat the USFSPA's purpose.

Moreover, the statute has a second, closely related "purpose" and "objective." The statute bars divorce courts from treating as community property any MRP that is waived "in order to receive compensation under ... title 38"—*i.e.*, disability pay. The point of this provision is to ensure that, in the context of divorce, disabled veterans keep all of their disability pay. *See McCarty*, 453 U.S. at 228 (purpose of federal preemption of state community property law is to ensure that federal benefit "actually reach the beneficiary") (quotation marks omitted). There is common ground on this point—the Arizona Supreme Court, Respondent, and the Government all agree that disability pay is not divisible, at the time of divorce or anytime thereafter, and that an order directly dividing

Petitioner's disability pay would be preempted. Pet. App. 7a; Br. in Opp. 15, 18-19; Gov't CVSG Br. 9-10.

But again, the divorce court's order plainly contravenes this purpose. Under the order, every month Petitioner must pay Respondent an amount equal to one-half of his disability pay. That is the precise economic equivalent of dividing Petitioner's disability pay, and it poses an obvious conflict with the congressional purpose that, in the context of divorce, a veteran is entitled to keep all of his disability pay.

This Court's precedents confirm that such an order conflicts with federal law. In a series of family law cases dating back over 60 years, this Court has held that if federal law confers a benefit on one person, state courts cannot nullify that federal law by requiring the person to pay an equivalent amount to someone else.

In *Wissner v. Wissner*, 338 U.S. 655 (1950), the federal National Service Life Insurance Act gave an Army officer the right to designate the beneficiary of his life insurance policy. The Army officer designated his mother. *Id.* at 656-57. After he died, his widow brought suit against his parents, alleging that she was entitled to half the proceeds of the policy under California's community property laws. *Id.* at 657-58. The California state court found in the widow's favor, but this Court reversed, finding that the federal statute preempted California community property law. The Court held that because "Congress has spoken with force and clarity in directing that the proceeds belong to the named beneficiary and no other," a state court could not redirect the proceeds pursuant to its community property laws. *Id.* at 658. Critically, the

Court deemed it irrelevant whether the widow sought the insurance proceeds themselves or a judgment for an amount equivalent to the proceeds: "Whether directed at the very money received from the Government or an equivalent amount, the judgment below nullifies the soldier's choice and frustrates the deliberate purpose of Congress. It cannot stand." *Id.* at 659; *see also Ridgway v. Ridgway*, 454 U.S. 46 (1981) (adhering to *Wissner* and holding that federal law granting service member right to select life insurance beneficiary preempted state law, which imposed constructive trust on life insurance benefits in favor of service member's ex-wife pursuant to terms of divorce decree).

Similarly, in *Hisquierdo v. Hisquierdo*, 439 U.S. 572 (1979), the federal Railroad Retirement Act conferred on retired railroad workers an entitlement to retirement and disability benefits. *Id.* at 573-77. A California divorce court, applying state community property law, awarded a railroad worker's ex-wife a share of the worker's expected benefits. *Id.* at 577-81. As in *Wissner*, this Court reversed, holding that federal law preempted California state community property law. The Court rejected the ex-wife's argument that a divorce court could order the retired worker "to pay her an appropriate portion of his benefit, *or its monetary equivalent*," holding that such an order "would mechanically deprive petitioner of a portion of the benefit Congress ... indicated was designed for him alone." *Id.* at 583 (emphasis added). It reasoned that "Congress has fixed an amount thought appropriate to support an employee's old age and to encourage the

employee to retire. Any automatic diminution of that amount frustrates the congressional objective." *Id.* at 585. Again, the Court's reasoning applied irrespective of whether the divorce court ordered the railroad worker to pay his ex-wife his federal benefits or the monetary equivalent of those benefits.

Most recently, in *Hillman*, this Court addressed the preemptive effect of the Federal Employees' Group Life Insurance Act of 1954, which permits federal employees to designate the proceeds of their federal life insurance policies. The federal employee in the case designated his first wife, Maretta, as his beneficiary; he later divorced and remarried his second wife, Hillman, but never changed his designation of beneficiary. 133 S. Ct. at 1949. After his death, Maretta received the insurance proceeds in accordance with the federal statute. *Id.* Hillman then sued Maretta under a Virginia law that would have made Maretta personally liable to Hillman for the exact amount Maretta received in insurance proceeds from the government. *Id.* This Court held that the Virginia statute was preempted, concluding: "[A]pplicable state law substitutes the widow for the beneficiary Congress directed shall receive the insurance money, and thereby frustrates the deliberate purpose of Congress to ensure that a federal employee's named beneficiary receives the proceeds." *Id.* at 1952 (citation and quotation marks omitted). The Court additionally explained: "It makes no difference whether state law requires the transfer of the proceeds, ... or creates a cause of action[] ... that enables another person to receive the proceeds upon filing an action in state court. In either case, state law

displaces the beneficiary selected by the insured in accordance with FEGLIA and places someone else in her stead." *Id.*

Wissner, *Hisquierdo*, and *Hillman* resolve this case. All parties agree that the Arizona divorce court was barred from directly dividing Petitioner's disability pay. Under *Wissner*, *Hisquierdo*, and *Hillman*, an order requiring Petitioner to pay Respondent an amount equal to one-half of his disability pay each month must be preempted as well because it is the economic equivalent of an order dividing Petitioner's disability pay, and would frustrate Congress' purpose of ensuring that Petitioner keep all of his disability pay.

Notably, the divorce court's order is preempted under the approach of every member of the *Hillman* Court. All members of the *Hillman* Court agreed that the Virginia statute was preempted, but two Justices, Justice Thomas and Justice Alito, concurred separately in the judgment. Even under the reasoning adopted by those Justices, however, the result in this case would be the same.

Justice Alito agreed with the application of the purposes-and-objectives preemption test but characterized the pertinent "purpose" and "objective" as "the effectuation of the insured's expressed intent" regarding the beneficiary of life insurance proceeds. *Id.* at 1957 (emphasis omitted). In Justice Alito's view, the Virginia statute frustrated that purpose by "overrid[ing] the insured's express declaration of his or her intent." *Id.* Here, the divorce court's order overrides Congress' express purpose of ensuring that disabled veterans receive the full amount of disability

pay to which they are entitled.

Justice Thomas disagreed with the application of a "'purpose and objectives' framework" and would instead have asked whether the "duly enacted federal law effectively repeal[ed] contrary state law." *Id.* at 1955 (Thomas, J., concurring in judgment) (quotation marks and alterations omitted). In Justice Thomas's view, the Virginia law was preempted under that standard because although it did not "preclude the direct payment of benefits to the designated beneficiary," "it accomplishe[d] the same prohibited result by transforming the designated party into little more than a passthrough for the true beneficiary." *Id.* at 1956. The same is true here. Even if there is some technical distinction between an order dividing MRP and the divorce court's "reimbursement" order, the divorce court, at the very least, "accomplishe[d] the same prohibited result," *id.*, by directing Petitioner to pay Respondent an amount equivalent to half of his waived MRP. And although the decree did not directly interfere with Petitioner's receipt of his disability pay, it achieved the same prohibited end by establishing Petitioner as nothing more than a passthrough for a one-half share of his disability pay. Thus, the divorce court's order "cannot be squared," *id.*, with the USFSPA, and it is preempted.

II. THE ARGUMENTS IN FAVOR OF UPHOLDING THE DIVORCE COURT'S ORDER ARE INCORRECT.

At the certiorari stage, Respondent and the Government advanced four arguments in support of the divorce court's order.

First, they argued that this case differs from *Mansell* because Petitioner became disabled after the divorce, rather than before the divorce, as in *Mansell*.

Second, they argued that the presumption against preemption requires a holding of non-preemption here.

Third, they argued that the divorce court's order was proper because it vindicated Respondent's state-law "vested right."

Fourth, Respondent (though not the Government) argued that the divorce court's order fell within the USFSPA's "saving clause."

As explained below, none of these arguments can override the USFSPA's text and purpose, which squarely prohibit the divorce court's order.

A. The USFSPA does not distinguish between disabilities that arise before and after a divorce.

1. *The USFSPA's text and purpose give no basis for distinguishing between pre-divorce and post-divorce waivers.*

The Arizona Supreme Court, Respondent, and the Government all argue that this case is distinguishable from *Mansell* because here Petitioner waived his MRP after the divorce and the divorce court awarded Respondent money representing half of Petitioner's waived MRP in a *modified* decree, whereas in *Mansell* the veteran waived his MRP before the divorce and the award of waived MRP was in the *original* decree. Pet. App. 6a-7a; Br. in Opp. 15-16; Gov't CVSG Br. 8.

This argument has no statutory basis whatsoever. Nothing in the statutory text even hints that pre-divorce and post-divorce waivers of MRP should be treated differently. The statute prohibits a divorce court from treating waived MRP as community property regardless of when the waiver occurs.

Likewise, there is no statutory basis for the proposition that modified decrees are somehow exempt from the USFSPA. The USFSPA contemplates that decrees may be modified: it defines a "court order" to include "a final decree modifying the terms of a previously issued decree of divorce, dissolution, annulment, or legal separation, or a court ordered, ratified, or approved property settlement incident to such previously issued decree." 10 U.S.C. § 1408(a)(2). The statutory prohibition on dividing waived MRP does not distinguish between modified decrees and original decrees. There is, therefore, no basis for concluding that a divorce court may include a term in a modified decree that would have been illegal in an original decree.

Nor does a distinction between pre-divorce and post-divorce waivers of MRP advance the USFSPA's purpose. As discussed above, the statute's purpose is to ensure that veterans keep all of their disability pay. That purpose is not advanced by distinguishing between a veteran who waives MRP after a divorce and a veteran who waives MRP before a divorce.

Moreover, although the legislative history does not specify the reason that Congress excluded waived MRP from the definition of divisible property, the policy rationales for that exclusion are straightforward.

Barring the division of waived MRP—and hence allowing disabled veterans to keep all of their disability pay—is consistent with the special solicitude the Nation has long shown for veterans who become disabled by virtue of their military service. Additionally, disabled veterans have reduced earning capacity—a veteran's disability rating is determined by reference to "the average impairments of earning capacity resulting from such injuries in civil occupations." 38 U.S.C. § 1155. Thus, barring the division of waived MRP may allow financially vulnerable disabled veterans, who may be unable to earn extra income in order to make up for payments to their ex-spouses, to remain afloat. These policy rationales apply with identical force regardless of whether a veteran waives MRP before or after a divorce.

The Arizona Supreme Court's distinction between pre-divorce and post-divorce MRP waivers simply has no basis in the USFSPA.

2. ***There is no practical distinction between the division of MRP in a modification order and the division of MRP in an original decree.***

The Arizona Supreme Court appeared to believe that there is some kind of fundamental distinction between dividing waived MRP in an original decree and requiring reimbursement for waived MRP in a modified decree. But that is incorrect, as a simple example will show. Suppose that a veteran and his spouse file for divorce. At the time of the divorce, the

veteran has not waived MRP and is not receiving disability pay, but the divorce court recognizes that the veteran might do so at some point in the future. The divorce court concludes that such a future waiver would be unfair. It therefore issues a decree stating: "if the veteran ever waives MRP in order to receive disability pay, the veteran will continue to ensure that his ex-spouse receives 50% of his total MRP." Such a decree would clearly be preempted: it would run afoul of *Mansell*'s rule that "the Former Spouses' Protection Act does not grant state courts the power to treat as property divisible upon divorce military retirement pay that has been waived to receive veterans' disability benefits." 490 U.S. at 594-95.

Now, to slightly modify the example, suppose the divorcing parties present the court with a proposed settlement decree in which—in line with *Mansell*—only disposable MRP, but not waived MRP, is divided. The divorce court, however, concludes that such a decree is unfair to the ex-spouse. Over the veteran's objection, the divorce court modifies the proposed decree to direct the veteran to continue to ensure that his ex-spouse receive half of his total MRP, including waived MRP, should he ever execute such a waiver in order to receive disability pay. Again, such an order would be preempted under the plain terms of *Mansell*'s holding because the court would be inserting a term into the decree that effectively divides waived MRP.

The present case is, however, virtually identical to the latter example. As in that example, the divorce court's order in this case modified the decree that the parties had agreed upon. Pet. App. 2a, 10a. The

economic effects of the orders in the latter example and in this case are the same: in both cases, when a veteran waives MRP after a divorce, the ex-spouse continues to receive half of the veteran's total MRP. The only difference between the latter example and this case is that in this case, the divorce court reopened the proceedings and altered the decree at the time of the waiver, rather than altering it at the time of the divorce. Yet nothing in the statute suggests that the timing of the divorce court's alteration of the decree should make a difference to federal preemption. Nor do any of the federal interests at stake depend on the timing of the state court's order. There is no rational reason Congress would have wanted to preempt the first type of order but not the second.

Indeed, the effect of the Arizona Supreme Court's holding is to insert an implied term in every Arizona divorce decree[6] involving an active-duty service member or nondisabled veteran that entitles a former spouse to a reimbursement order in the amount of half of the veteran's waived MRP should the veteran ever waive MRP in order to receive disability pay. Such a ruling is substantively identical to a ruling requiring every decree involving an active-duty service member or nondisabled veteran to include a provision explicitly dividing future waived MRP. *Mansell* directly forbids such a ruling.

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[6] More precisely, in every pre-2010 divorce decree, because such an indemnification order in a post-2010 divorce decree would violate a state statute. Ariz. Rev. Stat. § 25-318.01. In other states lacking such statutes, however, similar reasoning would introduce an implied term into every decree.

3. *The Arizona Supreme Court's interpretation would strip all active-duty service members of the USFSPA's protection.*

There is another reason that the Arizona Supreme Court's distinction between pre-divorce and post-divorce MRP waivers cannot be right. It would introduce an enormous loophole into the USFSPA: the statutory bar on dividing waived MRP would be rendered completely irrelevant for *any* service member who, like Petitioner, gets divorced while on active duty. Active-duty service members, by definition, do not receive MRP and thus cannot waive MRP in order to receive disability pay. Accordingly, under the Arizona Supreme Court's interpretation of the USFSPA, when *any* active-duty service member gets divorced, a divorce court can divide his future MRP; and if the service member later waives a portion of that MRP, the divorce court can later modify the decree and force the service member to pay half of the waived MRP to his ex-spouse pursuant to a "reimbursement" order. In effect, therefore, a divorce court can award the ex-spouse an interest in the service member's total MRP, including any portion that the service member may waive to receive disability pay.

Yet *McCarty*—the very case that prompted the enactment of the USFSPA—was all about divorces by active-duty service members. Mr. McCarty himself was an active-duty service member at the time of the divorce; like the divorce court in this case, the divorce court in *McCarty* awarded Mrs. McCarty an interest in the MRP he would receive upon his future retirement

from the military. 453 U.S. at 217-18. The Court's preemption analysis also focused almost exclusively on the effect of state community property law on active-duty service members. The Court identified two reasons that state community property law was preempted: (1) active members of the military "are not free to choose their place of residence," and (2) active members of the military should not have a "lessen[ed] incentive to retire." *Id.* at 234-35.

When Congress later enacted the USFSPA, it prohibited divorce courts from dividing waived MRP. If Congress had intended for that prohibition to be rendered meaningless for all active-duty service members who get divorced, one would think that the statute would have contained some textual indication of this intent. However, no such indication appears. The Court should not interpret the statute in a way that produces this anomalous result.

4. ***Distinguishing between pre-divorce and post-divorce waivers would lead to irrational results.***

It is so plain that the USFSPA treats pre-divorce and post-divorce waivers alike that the Court need not consider whether distinguishing between these two types of waivers makes policy sense. Should the Court deem this issue pertinent, however, the bizarre consequences of adopting this distinction further counsel against upholding the Arizona Supreme Court's interpretation. To name a few:

1. Under the Arizona Supreme Court's rule, an ex-spouse's entitlement to reimbursement for reductions

in the divorced couple's community property turns on the timing of the veteran's disability determination. If the veteran waives MRP and begins receiving disability pay before the divorce, the ex-spouse cannot receive any portion of the waived MRP. If the veteran waives MRP and begins receiving disability pay after the divorce, however, the ex-spouse can modify the decree so as to obtain a monthly payment equal to one-half of the disability pay.

Such a system would make the economic position of the parties turn on the amount of time it takes for the VA to process an application for disability pay. If the VA processes the application quickly, and the waiver occurs before the divorce, the veteran keeps his disability pay and the former spouse's share of MRP is reduced; if the VA processes the application slowly, and the waiver occurs after the divorce, the veteran may be forced to effectively share VA disability pay with a former spouse. The processing time of an application is highly variable given the famously dysfunctional nature of the VA benefits process. *See, e.g.*, Ian Duncan, *Amid Stubborn Backlog, VA Plans to Outsource More Disability Exams*, Baltimore Sun, Oct. 4, 2016, http://www.baltimoresun.com/news/maryland/politics/bs-md-va-exams-contract-20161003-story.html. It may depend on whether a veteran is able to obtain benefits in his initial application, or whether he is only able to obtain benefits after enduring the years-long appeals process. *See, e.g.*, Alan Zarembo, *VA Is Buried in a Backlog of Never-Ending Veterans Disability Appeals*, L.A. Times, Nov. 23, 2015, http://www.latimes.com/nation/la-na-veterans-appeals-

backlog-20151123-story.html. It is unlikely Congress intended for the economic position of veterans to turn on such random factors.

2. The Arizona Supreme Court's rule would inexplicably favor spouses from shorter marriages over spouses from longer marriages. Under the Arizona Supreme Court's rule, the spouses of veterans who waive MRP after a divorce can claw back half of the waived MRP through an indemnification order, whereas the spouses of veterans who waive MRP before a divorce cannot. Yet pre-divorce waivers of MRP typically occur in longer marriages—a pre-divorce waiver can only arise when a veteran serves a full military career, becomes eligible for MRP, and then waives a portion of his MRP. By contrast, post-divorce waivers will typically occur in the context of shorter marriages; for instance, divorces involving active-duty service members will invariably involve post-divorce rather than pre-divorce waivers.

Yet Congress frequently *favors* spouses from longer marriages. The extent of a military spouse's protection is generally a function of the length of the marriage. Under the USFSPA, divorced military spouses who were married for at least 10 years during which the veteran performed at least 10 years of military service become eligible for direct payments of MRP from the federal government (as opposed to payments from the veteran pursuant to a decree). 10 U.S.C. § 1408(d)(2). Under a related provision, divorced military spouses who were married for at least 20 years during which the veteran performed at least 20 years of military service become eligible for military health care under

the TRICARE program, as well as commissary and other privileges. 10 U.S.C. § 1072(2)(F). In light of Congress' solicitude for spouses from longer marriages, it would be incongruous to impute an intent to Congress to treat spouses from longer marriages worse than spouses from shorter marriages, especially without any textual indication of this intent.

3. Equally inexplicably, the Arizona Supreme Court's rule would favor spouses who never rely on disability benefits during a marriage over those who do. Under *Mansell*, a spouse who relies on the disability pay that substitutes for waived MRP during the marriage—say, by quitting her job in order to care for her disabled spouse—has no community property entitlement to half of that waived MRP. Yet, under the Arizona Supreme Court's interpretation of the USFSPA, a spouse who never was supported by disability pay during the marriage may obtain the economic equivalent of a one-half interest in the spouse's waived MRP by virtue of a post-divorce modification order. It is implausible that Congress would have wanted to confer such a remedy on spouses who never cared for disabled veterans, while simultaneously denying it to spouses who did.

4. The Arizona Supreme Court's decision would give an incentive to military spouses to file for divorce quickly. Suppose a veteran experiences pain and believes he might have a service-related disability (or might already have applied for disability pay). His marriage comes under strain, perhaps in part because of the disability itself. His spouse consults a divorce lawyer. Under the Arizona Supreme Court's decision,

any competent divorce lawyer would advise the spouse to file for divorce as soon as she can. If she files immediately, she can guarantee herself an amount equivalent to the veteran's total MRP for the rest of her life—she can obtain an award of MRP now, and enforce her "vested right" to obtain an indemnification award equivalent to half of any later waived MRP. If she waits, and the veteran waives MRP and begins receiving disability pay before the divorce is finalized, she will only be able to receive the veteran's disposable MRP. Congress likely did not intend to enact a regime under which military spouses have an incentive to divorce their disabled veteran spouses as quickly as possible.

* * *

In sum, the fact that Petitioner became disabled after the divorce, and that Respondent obtained her indemnification order through a modification proceeding rather than in the original decree, is of no moment for federal preemption purposes. What matters is that the divorce court's order required Petitioner to pay Respondent an amount equivalent to one-half of his total, including waived, MRP. Because such an order divided Petitioner's waived MRP, it violates federal law, regardless of its timing in the divorce proceeding. And although even the strongest policy arguments for distinguishing between pre-divorce and post-divorce waivers could not overcome the clarity of the USFSPA's text, the arbitrary consequences that such a distinction would yield are further grounds for rejecting it.

B. The Presumption Against Preemption Cannot Justify the Divorce Court's Order.

The Arizona Supreme Court leaned on the presumption against preemption as a basis for approving the divorce court's order. Pet. App. 7a-8a. Respondent and the Government rely on that same presumption. Br. in Opp. 15-18; Gov't CVSG Br. 10.

The Court need not address whether any presumption against preemption exists in this case because the divorce court's order stands in such clear conflict with federal law that any presumption against preemption would be overcome. As the Court noted in *Hillman*, "family law is not entirely insulated from conflict pre-emption principles, and so we have recognized that state laws governing the economic aspects of domestic relations must give way to clearly conflicting federal enactments." 133 S. Ct. at 1950 (quotation marks and ellipsis omitted). Accordingly, every preemption case on which Petitioner relies in this brief—*Mansell*, *McCarty*, *Hillman*, *Wissner*, *Ridgway*, and *Hisquierdo*—is a family law case in which the Court nonetheless found federal preemption. Under settled law concerning federal preemption in family law cases, the divorce court's order clearly conflicts with the USFSPA and is therefore preempted, regardless of any presumption.

If the Court reaches the issue, however, it should hold that the presumption against preemption does not apply at all in this case or, at most, that it applies in a significantly weakened form. This is so for four reasons.

1. In *McCarty*, the Court held that federal law completely preempted state law with respect to the treatment of MRP in divorce. The Court emphasized that Congress enacted the MRP system pursuant to its constitutional "power '[t]o raise and support Armies,' '[t]o provide and maintain a Navy,' and '[t]o make[] Rules for the Government and Regulation of the land and naval Forces.'" 453 U.S. at 232 (citing U.S. Const., art. I, § 8, cls. 12, 13, and 14), and that "the application of community property principles to military retired pay threaten[ed] grave harm to clear and substantial federal interests." *Id.* (quotation marks omitted).

The USFSPA, of course, overrode *McCarty* with regard to disposable MRP. But in *Mansell*, this Court rejected the argument of Mrs. Mansell and the dissent that "the Former Spouses' Protection Act [was] a complete congressional rejection of *McCarty*'s holding that state law is pre-empted." 490 U.S. at 588; *see id.* at 595-96 (O'Connor, J., dissenting). Instead, the Court explained that "pre-existing federal law ... completely pre-empted the application of state community property law to military retirement pay," and "Congress could overcome the *McCarty* decision only by enacting an affirmative grant of authority giving the States the power to treat military retirement pay as community property." *Id.* at 588 (majority opinion). Thus, in the particular context of the disposition of MRP upon divorce, *Mansell* rejected any presumption against preemption. Instead, it held that federal law completely preempts all state law unless a federal statute affirmatively confers power on state divorce courts.

Here, given that the USFSPA expressly *prohibits* state courts from dividing waived MRP, the USFSPA certainly does not provide the sort of congressional authorization required by *Mansell* to allow state courts to require military retirees to indemnify former spouses for post-divorce waivers of MRP.

2. The presumption against preemption does not apply in areas of strong federal interest. *See, e.g.*, *Buckman Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 341, 347 (2001) (presumption is not triggered in areas where "the interests at stake are uniquely federal in nature"). The question in this case is whether Congress preempted family court orders that impose additional payment obligations on disabled veterans as a direct result of their decision to waive a portion of their MRP in order to receive disability pay. There are plainly strong federal interests in that question.

First, there is a strong federal interest in regulating military benefits and the rights of veterans. *See, e.g.*, *McCarty*, 453 U.S. at 236 ("[I]n no area has the Court accorded Congress greater deference than in the conduct and control of military affairs"); *Wissner*, 338 U.S. at 660-61 ("Certainly Congress in its desire to afford as much material protection as possible to its fighting force could wisely provide a plan of insurance coverage. ... The end is a legitimate one within the congressional powers over national defense, and the means are adapted to the chosen end.").

Moreover, military retirement and disability benefits involve federal tax dollars. As this Court noted in *Hisquierdo*, in holding that federal law preempted state community property law with regard

to the disposition of Railroad Retirement Act benefits, "Railroad Retirement Act benefits from their very inception have federal overtones. Compulsory federal taxes finance them and not just the taxes that fall on the employee. ... Here, California must defer to the federal statutory scheme for allocating Railroad Retirement Act benefits insofar as the terms of federal law require." 439 U.S. at 582. The Court analogized the case to *McCune v. Essig*, 199 U.S. 382 (1905), in which this Court held that federal law preempted state community property law with regard to homesteaded land that was owned by the United States. *See* 490 U.S. at 582 (citing *McCune*, 199 U.S. at 390); *see also Ridgway*, 454 U.S. at 57 (noting that the federal interest in the disposition of service-members' life insurance policies was "especially strong because a substantial share of the proceeds of [such policies] may be attributed to general tax revenues").

In view of these substantial federal interests, there is no reason to presume that Congress would have wanted to leave the legal consequences of waiving MRP in favor of disability pay to the vagaries of state law.

3. The presumption against preemption does not apply in areas "where there has been a history of significant federal presence." *United States v. Locke*, 529 U.S. 89, 108 (2000). There has been a significant federal presence in determining the disposition of military benefits. Congress has provided disability pensions to veterans since the Revolutionary War and has provided retirement pensions since the Civil War. *McCarty*, 453 U.S. at 211-12. "Historically, military

retired pay has been a personal entitlement payable to the retired member himself as long as he lives." *Id.* at 224 (quoting S. Rep. No. 90-1480, at 6 (1968)) (emphasis omitted).

Moreover, Congress has devoted scrupulous attention to family-law issues surrounding military benefits, constantly tinkering with the governing statutes. To take just a few examples:

- In 1984, Congress authorized enforcement of voluntary divorce agreements in which service members agreed to elect their former spouses as the beneficiaries of annuities under the Survivor Benefit Plan. *See* Department of Defense Authorization Act, 1985, Pub. L. No. 98-525, § 644, 98 Stat. 2492, 2548 (1984). It also expanded the pool of former spouses eligible to receive military medical benefits. *See* § 645, 98 Stat. at 2548-49.

- Two years later, in 1986, Congress authorized state divorce courts to require that service members elect their former spouses as the beneficiaries of SBP annuities. *See* National Defense Authorization Act for Fiscal Year 1987, Pub. L. No. 99-661, § 641, 100 Stat. 3816, 3885 (1986). At the same time, it lowered the age at which former spouses may become ineligible for SBP payments if they remarry. § 643, 100 Stat. at 3886. It also modified the definition of "disposable retired pay" in two respects. First, it eliminated deductions for

government life insurance premiums. Second, for veterans who retire from military service by reason of disability, it made the non-disability-related portion of their disability retirement pay eligible for division. § 644, 100 Stat. at 3887.[7]

- In 1990, as mentioned previously, Congress revised the USFSPA's definition of "disposable retired pay" to include amounts withheld for federal, state, and local tax purposes and certain debts of the retiree. National Defense Authorization Act for Fiscal Year 1991, Pub. L. No. 101-510, § 555, 104 Stat. 1484, 1569–70 (1990).

- In 1992, Congress enacted financial protections for former spouses of military retirees whose rights to receive MRP are terminated because of domestic abuse involving their former spouses or dependent children. National Defense Authorization Act for Fiscal Year 1993, Pub. L. No. 102-484, § 653, 106 Stat. 2315, 2426-29 (1992).

- Most recently, on December 23, 2016, the President signed legislation prospectively amending § 1408(a)(4) so that divisible MRP

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[7] Under title 10, chapter 61, service members may be retired by reason of a disability and may receive disability retirement pay. As originally enacted, the USFSPA excluded all disability retirement pay from the definition of disposable retirement pay. 96 Stat. 731. The modification allowed the division of the portion of disability retirement pay not based on a retiree's disability.

> is now defined as "the amount of basic pay payable to the member for the member's pay grade and years of service at the time of the court order," adjusted for cost of living. National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, § 641. This provision "modifi[es] the division of military retired pay in a divorce decree to the amount the member would be entitled based upon the member's pay grade and years of service at the time of the divorce rather than at the time of retirement." S. Rep. No. 114-255, at 168 (2016). It thus protects active-duty service members who divorce part-way through their military careers by ensuring that only the MRP attributable to their years of service during marriage may be divided.

These are but a sampling of the statutory changes Congress has made in this area. Following *Mansell*, Congress has made other substantive amendments to § 1408 in 1993, 1996 (twice), and 2006[8], as well as numerous technical changes to § 1408.[9] The bar on

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[8] National Defense Authorization Act for Fiscal Year 1994, Pub. L. No. 103-160, § 555, 107 Stat. 1547, 1666-67 (1993); Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, § 362(c), 110 Stat. 2105, 2246-47; National Defense Authorization Act for Fiscal Year 1997, Pub. L. No. 104-201, § 636, 110 Stat. 2422, 2579 (1996); National Defense Authorization Act for Fiscal Year 2006, Pub. L. No. 109-163, § 665, 119 Stat. 3136, 3317–18.

[9] *See* National Defense Authorization Act for Fiscal Year 2010, Pub. L. No. 111-84, § 1073, 123 Stat. 2190, 2472–73 (2009);

dividing waived MRP, however, has remained intact.

It is clear from this volume of legislation that Congress views family-law issues surrounding military benefits as issues for the federal government to resolve. In view of Congress' presence in this area, a presumption that Congress intended to leave these issues to state courts is inappropriate.

4. The presumption against preemption is inapplicable because the USFSPA is a statute that specifically deals with divorce. The presumption against preemption is based on the assumption that Congress does not intend to regulate state family law. But as the Court observed in *Mansell*, the USFSPA "presents one of those rare instances where Congress has directly and specifically legislated in the area of domestic relations." 490 U.S. at 587. Indeed, this Court held in *Mansell* that the very statutory provision at issue in this case preempted a state divorce decree. Moreover, that provision has no purpose *other than* to

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Servicemembers Civil Relief Act, Pub. L. No. 108-189, § 2, 117 Stat. 2835, 2865–66 (2003); Homeland Security Act of 2002, Pub. L. No. 107-296, § 1704(b), 116 Stat. 2135, 2314; National Defense Authorization Act for Fiscal Year 2002, Pub. L. No. 107-107, § 1048(c), 115 Stat. 1012, 1226 (2001); National Defense Authorization Act for Fiscal Year 1998, Pub. L. No. 105-85, § 1073, 111 Stat. 1629, 1900–01 (1997); National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, § 1501(c), 110 Stat. 186, 498–99; National Defense Authorization Act for Fiscal Years 1992 and 1993, Pub. L. No. 102-190, § 1061(a), 105 Stat. 1290, 1472 (1991); National Defense Authorization Act for Fiscal Years 1990 and 1991, Pub. L. No. 101-189, §§ 653(a), 1622(e), 103 Stat. 1352, 1461–62, 1604–05 (1989); Defense Technical Corrections Act of 1987, Pub. L. No. 100-26, § 7(h), 101 Stat. 273, 282 (1987)

override state divorce law by limiting state courts' authority to divide MRP. As such, any presumption against preemption of state divorce law has been overcome, and has no further role to play. *Cf. Gobeille v. Liberty Mut. Ins. Co.*, 136 S. Ct. 936, 946 (2016) (holding that although in some cases the Court has "addressed claims of pre-emption with the starting presumption that Congress does not intend to supplant state law, in particular state laws regulating a subject of traditional state power," that presumption did not apply in the context of ERISA because ERISA "certainly contemplated the pre-emption of substantial areas of traditional state regulation" (quotation marks omitted)).

For this reason, the present case is easier than cases like *Hillman* and *Wissner*, in which the federal statutes merely addressed federal employees' right to select life insurance beneficiaries and did not expressly regulate the disposition of insurance proceeds upon divorce. In those cases, the Court nonetheless held that the federal interest in ensuring that the proceeds were distributed to beneficiaries as Congress directed trumped state law. Here, the USFSPA's protections for service members appear in a statute that specifically regulates property division upon divorce. The argument for any presumption against preemption is, therefore, much weaker, and the case for finding preemption is even stronger.

C. The Arizona Supreme Court's "Vested Rights" Analysis Cannot Overcome Federal Preemption.

In arguing for affirmance, Respondent asserts that

she had a vested interest in the portion of Petitioner's MRP that he waived post-divorce to receive disability pay, and that "[t]he USFSPA cannot divest a vested interest in military retirement pay." Br. in Opp. 16; *see also* Gov't CVSG Br. 8-9. She relies on the following portion of the Arizona Supreme Court's decision:

> [Respondent] had a vested right to receive future distributions of her share of MRP unencumbered by any adjustments initiated by [Petitioner]. MRP is a form of deferred compensation. Thus, the MRP earned during the parties' marriage belonged to the community and was divisible upon dissolution of the marriage. After the dissolution decree became final and the corresponding qualified domestic relations order issued, nothing more needed to occur to entitle [Respondent] to fifty percent of the MRP; it had already been earned.

Pet. App. 12a (citation omitted). The court then stated that Petitioner's waiver of disability pay had infringed Respondent's vested right and that the indemnification order vindicated this right:

> One spouse cannot invoke a condition solely within his or her control to defeat the community interest of the other spouse. By electing the VA waiver, [Petitioner] did precisely that by essentially converting part of [Respondent's] MRP share. The 2014 Order restored [Respondent's] share of community assets by ordering [Petitioner] to 'make up' the reduction and pay arrearages.

Id. at 13a (citation omitted).

The Arizona Supreme Court did not suggest that Respondent's "vested right" was pertinent to the federal preemption analysis; rather, it was relevant only to the court's state-law analysis. But Respondent insists that the Arizona Supreme Court's framing of the divorce court's order as enforcing a "vested right" defeats federal preemption. Br. in Opp. 16; *see also* Gov't CVSG Br. 8-9.

That argument is unpersuasive. The whole point of *Mansell* is that federal law *prohibits* the creation of such a vested interest. The Arizona Supreme Court held that Respondent had a "vested right to receive future distributions of her share of MRP unencumbered by any adjustments initiated by [Petitioner]," because "MRP is a form of deferred compensation" that "belonged to the community and was divisible upon dissolution of the marriage." Pet. App. 12a. But that is nothing more than a holding that Respondent had a vested right to a one-half share of Petitioner's total, as opposed to disposable, MRP. As discussed previously, state courts have no authority to award former spouses, like Respondent, an interest in service members' *total* MRP; they may only award former spouses an interest in service members' *disposable* MRP.

The Arizona Supreme Court viewed Petitioner's waiver of MRP as "defeat[ing] the community interest" of Respondent and "converting part of" Respondent's "MRP share." *Id.* at 13a. Again, however, the premise of this argument is that Respondent had a "community interest" in Petitioner's *total* MRP, and Petitioner's

waiver of MRP converted part of her share in the total MRP. Creating a "community interest" in Petitioner's total MRP is, however, precisely what federal law prohibits.

Indeed, the exact same argument could have been made in *Mansell*. In *Mansell*, the veteran unilaterally waived a portion of his MRP; that waiver, too, could have been characterized as "defeating" his spouse's community interest and "converting" part of his spouse's MRP share. But the Court nonetheless held that the USFSPA preempted a state's effort to nullify the effect of a veteran's MRP waiver. So too here.

The Arizona Supreme Court evidently intended to ensure that Respondent would not be economically harmed by Petitioner's MRP waiver. But Petitioner had an absolute right to waive MRP in order to receive disability pay—as even the Arizona Supreme Court acknowledged. Pet. App. 10a (noting that Petitioner made an "election of a benefit bestowed by Congress"). And when a veteran waives MRP, the ineluctable effect of such a waiver under the USFSPA is that the amount of divisible community property goes down. The Arizona Supreme Court's effort to ensure that Respondent would not be economically affected by a waiver is contrary to federal law, which dictates that a waiver of MRP *does* decrease the amount of community property.

The Arizona Supreme Court's "vested rights" analysis has another troubling consequence: it would result in some veterans who serve long enough to earn MRP being financially worse off than veterans who do not. Consider two divorced veterans: one earns $1500 a

month in MRP that has been divided in a divorce decree,[10] while the other did not serve long enough to become eligible for MRP. Both veterans are deemed 40% disabled after they get divorced, and both begin receiving $800 a month in disability pay.[11] The first veteran must waive $800 in MRP to receive his disability pay, while the second veteran has no MRP to waive. Under the Arizona Supreme Court's "vested rights" analysis, setting aside tax effects, the first veteran is now worse off than the second veteran. The first veteran now receives $700 in MRP and $800 in disability pay per month, but must pay his ex-spouse $750 per month to vindicate the state-law "vested right" to total MRP, leaving him with $750 per month. But because disability pay is not divisible in divorce, the second veteran may keep his $800 per month. It is unlikely that in enacting the USFSPA, Congress intended to authorize state courts to transform eligibility for MRP into a financial burden.

The situation would have been even worse at the time of the USFSPA's enactment. In 2004, Congress amended federal law to permit veterans with disability ratings of 50% or greater to concurrently receive disability pay and MRP. *Supra* at 4 n.3. Before 2004, however, veterans who had disability ratings exceeding

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[10] Petitioner's gross MRP in October 2013 was $1,474. Pet. App. 3a.

[11] A remarried veteran who is 40% disabled and has two parents and a child would earn $806.12 per month in disability pay. http://www.benefits.va.gov/COMPENSATION/resources_comp01.asp.

50% also had to waive MRP to receive disability pay. For many veterans with high disability ratings, monthly disability pay exceeded monthly MRP, meaning that they had to waive all of their MRP in order to receive disability pay.[12] For divorced, disabled veterans in this situation, the Arizona Supreme Court's "vested rights" analysis would have transformed eligibility for MRP into a financial disaster: they would not receive *any* MRP (because it would all be waived), yet their eligibility for MRP would have triggered their ex-spouses' vested rights to half of their waived MRP, thus effectively depriving them of as much as half of their disability pay each month. And the higher the veteran's waived MRP, the greater the financial disaster. Again, it is unlikely that this result accords with Congress' intent. By contrast, Petitioner's interpretation of the USFSPA—under which state courts may not issue orders that are the economic equivalent of dividing waived MRP—would have prevented this scenario from ever arising.

In sum, the Arizona Supreme Court's "vested rights" analysis cannot defeat federal preemption. The Arizona Supreme Court itself deemed that analysis relevant only to the state-law issues, and for good reason. The recognition of a "vested right" to total MRP directly violates the USFSPA and leads to results Congress could not have intended.

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[12] *See, e.g., Black v. Black*, 842 A.2d 1280, 1282 (Me. 2004) (presenting this scenario); *Clauson v. Clauson*, 831 P.2d 1257, 1259 (Alaska 1992) (same).

D. The Divorce Court's Order Does Not Fall Within the USFSPA's "Saving Clause."

Finally, the divorce court's order does not fall within the USFSPA's "saving clause." The saving clause provides:

> Nothing in this section shall be construed to relieve a member of liability for the payment of alimony, child support, or other payments required by a court order on the grounds that payments made out of disposable retired or retainer pay under this section have been made in the maximum amount permitted under [the direct payments mechanism]. Any such unsatisfied obligation of a member may be enforced by any means available under law other than the means provided under this section in any case in which the maximum amount permitted under ... [the direct payments mechanism] has been paid.

10 U.S.C. § 1408(e)(6).

At the certiorari stage, citing this provision and quoting from the *Mansell* dissent, Respondent argued that "a state court order can properly be directed at MRP not being paid directly to Respondent." Br. in Opp. 19.

The *Mansell* majority, however, did not adopt that view. The Court rejected Mrs. Mansell's argument that "because the saving clause expressly contemplates 'other payments' in excess of those made under the direct payments mechanism, the Act does not 'attempt

to tell the state courts what they may or may not do with the underlying property.'" 490 U.S. at 590 (citation omitted). It adopted a "different interpretation" instead: "the saving clause serves the limited purpose of defeating any inference that the federal direct payments mechanism displaced the authority of state courts to divide and garnish property not covered by the mechanism." *Id.* Thus, the saving clause ensures that state courts may enforce orders for alimony and child support; it does not authorize state courts to treat waived MRP as divisible property. That reasoning applies with identical force here, and the Court should reject Respondent's invitation to overrule *Mansell*'s interpretation of the saving clause.

* * *

In *Mansell*, the Court stated: "Congress chose the language that requires us to decide as we do, and Congress is free to change it." *Id.* at 594. In the ensuing years, Congress has devoted scrupulous attention to family-law issues surrounding military benefits, repeatedly amending the USFSPA to achieve a fair balance between the interests of veterans and their ex-spouses. But Congress has left the USFSPA's bar on dividing waived MRP intact. Unless Congress revisits that issue, state courts must abide by the USFSPA. Here, the divorce court's order contradicted both the text and purpose of the USFSPA and is thus preempted by federal law.

CONCLUSION

The judgment of the Arizona Supreme Court should be reversed.

Respectfully submitted,

KEITH BERKSHIRE
BERKSHIRE LAW OFFICE
5050 N. 40th St.,
Suite 340
Phoenix, AZ 85018
(602) 396-7669

ADAM G. UNIKOWSKY
Counsel of Record
JENNER & BLOCK LLP
1099 New York Ave., NW
Suite 900
Washington, DC 20001
(202) 639-6000
aunikowsky@jenner.com

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RECORD AND I BRIEFS,

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In The

Supreme Court of the United States

JOHN HOWELL,

Petitioner,

v.

SANDRA HOWELL,

Respondent.

On Writ Of Certiorari To The Arizona Supreme Court

BRIEF FOR RESPONDENT

CHARLES W. WIRKEN
Counsel of Record
GUST ROSENFELD, PLC
One E. Washington
Suite 1600
Phoenix, AZ 85004-2553
(602) 257-7959
cwirken@gustlaw.com
Counsel for Respondent

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTION PRESENTED

Petitioner and Respondent agreed prior to divorce that Respondent was entitled to fifty percent of Petitioner's military retirement pay, and the decree so awarded. Petitioner later elected to receive veterans' disability benefits and waived an equal amount of retirement pay, consequently reducing Respondent's vested interest. Does the Uniformed Services Former Spouses' Protection Act preempt the state court's enforcement or modification of a stipulated decree in order to indemnify Respondent and avoid depriving her of vested property without due process?

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STATUTES INVOLVED

In addition to the provisions set out in the Brief of Petitioner, the following is also involved.

10 U.S.C. § 1408(e)(6)

> Nothing in this section shall be construed to relieve a member of liability for the payment of alimony, child support, or other payments required by a court order on the grounds that payments made out of disposable retired pay under this section have been made in the maximum amount permitted under paragraph (1) or subparagraph (B) of paragraph (4). Any such unsatisfied obligation of a member may be enforced by any means available under law other than the means provided under this section in any case in which the maximum amount permitted under paragraph (1) has been paid and under section 459 of the Social Security Act (42 U.S.C. 659) in any case in which the maximum amount permitted under subparagraph (B) of paragraph (4) has been paid.

STATEMENT OF THE CASE

Petitioner John Howell and Respondent Sandra Howell resided and divorced in Arizona. Pet. App. 39a. Arizona is a community property state.

At the time of their divorce they contemplated that John's retirement was imminent. Pet. App. 43a.

Accordingly, they *agreed* to equally divide John's forthcoming military retirement pay (MRP). Their agreement provided:

> [Sandra] is entitled to and is awarded as her sole and separate property FIFTY PERCENT (50%) of [John's] military retirement when it begins through a direct pay order.

Pet. App. 24a, 32a.

The Decree of Dissolution of Marriage entered on April 16, 1991 tracks the settlement agreement verbatim:

> [Sandra] is entitled to and is awarded as her sole and separate property FIFTY PERCENT (50%) of [John's] military retirement when it begins through a direct pay order.

Pet. App. 41a.

Sandra's apparent financial need entitled her to receive spousal maintenance from John. The Decree ordered him to pay maintenance until he retired and she began receiving her share of the community property MRP. Pet. App. 43a.

John retired from the Air Force in 1992 after a twenty-year career. Pet. App. 2a. Payment of MRP began in 1992. Pet. App. 24a.

In 2004, John voluntarily petitioned for Veterans Administration disability benefits. Pet. App. 24a, 32a. He received a retroactive disability rating of twenty percent in 2005. *Id.* Because federal law prohibits

duplication of MRP and disability benefits, *see* 38 U.S.C. §§ 5304-5305, John elected to waive MRP in an amount equal to his disability benefits of approximately $250 per month. Pet. App. 24a, 33a. Consequently, the amount of Sandra's share of MRP was reduced by one-half of the amount John waived. *Id.*

In 2013, Sandra moved to enforce the Decree's award of MRP and John moved to dismiss that motion. Pet. App. 31a. John *agreed* that Sandra had a *vested interest* in fifty percent of the MRP, and acknowledged he could not, under Arizona case law, unilaterally divest Sandra's interest in the MRP. Pet. App. 35a.

John did not argue the intent of his agreement with Sandra to share his MRP equally. Specifically, he did not argue that the agreement allowed him to unilaterally reduce the dollar amount of Sandra's vested interest. *See* Pet. App. 31a-38a.

John argued, instead, that a post-decree enactment, A.R.S. § 25-318.01, overruled prior case law by prohibiting the modification of a property division to indemnify a veteran's spouse for a reduction in MRP related to the veteran's receipt of disability benefits. Pet. App. 31a-38a.

In ruling on the motions, the family court found:

- Sandra "had a vested property right in 50% of [John's] military retirement." Pet. App. 35a.
- "[Sandra] was dependent on and expecting this money." Pet. App. 33a.

- A.R.S. § 25-318.01 cannot be applied retroactively to vested property rights. Pet. App. 37a.
- John "had an obligation to pay [Sandra] 50% of the military retirement as ordered in the decree." Pet. App. 37a.
- John "violated the decree by unilaterally decreasing the retirement pay in favor of disability pay." Pet. App. 36a.
- "[John] owed [Sandra] 50% of the military retirement regardless of the disability rating as his election unilaterally alters a vested property right." Pet. App. 37a.

Accordingly, John's motion to dismiss was denied, Pet. App. 37a, as was his motion for reconsideration. Pet. App. 29a.

After an evidentiary hearing to determine the amount John owed to Sandra, the family court "Ordered that [John] is responsible for ensuring [Sandra] receive her full 50% of the military retirement without regard for the disability." Pet. App. 28a. That order did not direct how John was to comply. Specifically, it did not order him to pay from his disability benefits. John apparently did not make a record regarding his income and assets from which he could pay Sandra.

On appeal, John argued for the first time that the Uniformed Services Former Spouses' Protection Act (USFSPA) preempted the family court's authority to order him to indemnify Sandra. The Arizona Court of Appeals deemed the issue waived. Pet. App. 20a-20b.

The Arizona Supreme Court, however, considered it. Pet. App. 5a.

Observing that "Sandra was awarded fifty percent of the MRP years before John unilaterally elected to receive disability pay in lieu of a portion of MRP" and that the "Order did not divide the MRP subject to the VA waiver, order John to rescind the waiver, or direct him to pay any amount to Sandra from his disability pay," the Arizona Supreme Court concluded that "the family court did not violate the USFSPA or *Mansell* because it did not treat the MRP subject to the VA waiver as divisible property." Pet. App. 7a.

Citing *Mansell*'s recognition that "domestic relations are preeminently matters of state law," and the corresponding requirement for positive evidence of preemption by direct enactment, the Arizona Supreme Court concluded:

> Nothing in the USFSPA directly prohibits a state court from ordering a veteran who makes a post-decree VA waiver to reimburse the ex-spouse for reducing his or her share of MRP. Absent such direct prohibition, we decline to find federal prohibition.

Pet. App. 8a.

The Arizona Supreme Court therefore held "that federal law does not preempt the family court's authority to order a retired veteran to indemnify an ex-spouse for a reduction in MRP caused by a post-decree waiver of MRP made to obtain disability benefits." Pet. App. 14a.

Lastly, the Arizona Supreme Court ruled "Sandra had a vested right to receive future distributions of her share of MRP unencumbered by any adjustments initiated by John." Pet. App. 12a. In that circumstance, the inapplicability of A.R.S. § 25-318.01 was affirmed. The Arizona Supreme Court held that the statute "cannot be applied to prohibit the court from entering an indemnification order in these circumstances if the ex-spouse's share of MRP vested as a property right before the statute's enactment." Pet. App. 14a. Otherwise, the statute would "diminish Sandra's vested property right in violation of the due process guarantee." *Id.*

SUMMARY OF ARGUMENT

This Court held in *McCarty v. McCarty*, 453 U.S. 210 (1981), that MRP was the personal entitlement of the service member and therefore not divisible upon divorce. The USFSPA was enacted to "reverse" *McCarty* by authorizing the States to treat MRP according to state law, and thereby protect the former spouses of service members. As defined in the USFSPA, divisible MRP excludes MRP that has been waived in order to receive veteran's disability benefits. Accordingly, this Court held in *Mansell v. Mansell*, 490 U.S. 581 (1989), "that the Former Spouses' Protection Act does not grant states the power to treat as property divisible upon divorce military retirement pay that has been waived to receive veterans' disability benefits." 490 U.S. at 494-495.

In Arizona, MRP is community property. It is a form of deferred compensation earned during marriage and divisible upon divorce. When it is divided, whether by agreement or not, Arizona law provides that the family court's decree creates a vested property right to future payments that a veteran cannot later unilaterally and negatively affect. Pet. App. 1a.

John and Sandra Howell agreed to divide his MRP equally, and their divorce decree so ordered. Thirteen years later, John voluntarily sought to receive disability benefits. After an evaluation determined him to be twenty percent disabled, he elected to accept disability benefits. Doing so reduced his MRP dollar-for-dollar, and thereby reduced the payments to Sandra. On Sandra's motion to enforce the decree, the family court "Ordered that [John] is responsible for ensuring [Sandra] receive her full 50% of the military retirement without regard for the disability." But, as the Arizona Supreme Court observed, the "Order did not divide the MRP subject to the VA waiver, order John to rescind the waiver, or direct him to pay any amount to Sandra from his disability pay."

The regulation of domestic relations has traditionally been left to the States. There is therefore a presumption against pre-emption of state laws governing domestic relations. When Congress enacted the USFSPA, it did not expressly pre-empt the application of state law to the division of MRP. Instead, it explicitly authorized the division of MRP according to state law. It must therefore be presumed that state law regarding agreements to divide MRP, the nature of the property

interest created by an agreed or decreed division of MRP, and the enforcement or modification of decrees for the division of MRP is not pre-empted.

The issuance of a family court order requiring a veteran to indemnify a former spouse for a reduction in vested MRP after the veteran waives MRP to receive disability benefits, especially when the parties had agreed to the division of MRP, does not conflict with the purposes and objectives of the USFSPA. The primary purpose of the USFSPA to protect former spouses of veterans receiving MRP is actually furthered by such an order. And the order does not do "major damage" to any "clear and substantial" federal interest. Indeed, the only applicable federal interest – providing for the retired member – is not damaged because Congress has expressly authorized the division of MRP.

Finally, *Mansell* is not controlling and the indemnification order herein does not violate its holding. The MRP divided in *Mansell* included MRP that had already been waived to receive disability benefits. In other words, the spouse in *Mansell* had not acquired a vested interest in the waived MRP before the waiver.

ARGUMENT

I. THE PRESUMPTION AGAINST PRE-EMPTION OF STATE FAMILY LAW REMAINS APPLICABLE DESPITE *MCCARTY*, THE USFSPA, AND *MANSELL*.

Contrary to John's argument, resolution of this case requires consideration of the presumption against pre-emption of state domestic relations law. That is so for several reasons. First and foremost, there has been no express pre-emption. *McCarty* necessarily relied on conflict pre-emption principles. And the USFSPA does not expressly pre-empt state law. *See* 10 U.S.C. § 1408.

Second, *Mansell* did not reject "any presumption against preemption," as John asserts. Br. 37.

Third, neither did *Mansell*, as John further asserts, "h[o]ld that that federal law completely preempts *all state law* unless a federal statute affirmatively confers power on state divorce courts." *Id.*, emphasis added. Instead, *Mansell* narrowly held "that the Former Spouses' Protection Act does not grant states the power to treat as property divisible upon divorce military retirement pay that has been waived to receive veterans' disability benefits," 490 U.S. at 494-495. That holding thus leaves room for the application of other aspects of domestic relations law.

When analyzing pre-emption, this Court has long recognized that the regulation of domestic relations is primarily left to the States. The rule has been consistently expressed for more than a century. "The whole subject of the domestic relations of husband and wife

. . . belongs to the laws of the States and not to the laws of the United States." *In re Burrus*, 136 U.S. 586, 593-594 (1890). "[D]omestic relations [is] an area that has long been regarded as a virtually exclusive province of the States." *Sosna v. Iowa*, 419 U.S. 393, 404 (1975). "[D]omestic relations are preeminently matters of state law." *Mansell v. Mansell*, 490 U.S. at 587. "The regulation of domestic relations is traditionally the domain of state law." *Hillman v. Maretta*, 133 S.Ct. 1943, 1950 (2013). In other words, there is no "strong federal interest" in domestic relations and it is not "uniquely federal in nature."

"There is therefore a 'presumption against pre-emption' of state laws governing domestic relations. . . ." *Hillman*, 133 S.Ct. at 1950 (citation omitted). That presumption is buttressed by experience. This Court has "consistently recognized that Congress, when it passes general legislation, rarely intends to displace state authority in this area [of domestic relations]." *Mansell*, 490 U.S. at 587, citing cases.

The presumption has been characterized as "strong." *Ablamis v. Roper*, 937 F.2d 1450, 1464 (9th Cir. 1991); *Savings and Profit Sharing Fund of Sears Employees v. Gago*, 717 F.2d 1038, 1041 (7th Cir. 1983). Accordingly, the standard for pre-emption analysis in the context of domestic relations has been said to be "stringent." *Franz v. United States*, 712 F.2d 1428, 1435 (D.C. Cir. 1983) (Bork, J., concurring and dissenting).

Although *McCarty* held that the federal statutes then governing MRP prevented state courts from

treating it as community property, that holding is limited and did not settle the issue of pre-emption as to all aspects of domestic relations law that intersect the subject of MRP. Neither did the adoption of the USFSPA to authorize state courts to treat MRP as community property preclude any further consideration of the presumption against pre-emption. While the USFSPA is "one of those rare instances where Congress has directly and specifically legislated in the area of domestic relations," *Mansell*, 490 U.S. at 587, it did not pre-empt the application of all state law in the context of MRP. John's comparison to *Gobeille v. Liberty Mut. Ins. Co.*, 136 S.Ct. 936 (2016), is inapt because ERISA expressly pre-empts state law, even state law exercising a traditional state power.

Furthermore, the deference given by this Court to Congress regarding military matters does not negate the presumption against pre-emption of state domestic relations law. Instead, Congress has left the presumption intact by authorizing the States to treat MRP as community property and not expressly pre-empting the field of related family property laws.

For the same reason, the "history of significant federal presence" in military disability and retirement benefits does not eliminate the presumption against pre-emption of domestic relations law related to the authorized division of MRP. John's list of examples of Congressional "tinkering" with military benefits, Br. 40-42, does not support a different conclusion. To borrow a characterization made by then Justice

Rehnquist, John's argument is based on "vague implications from tangentially related enactments." *McCarty*, 453 U.S. at 237 (Rehnquist, J., dissenting).

For these reasons, the presumption against pre-emption still informs the pre-emption analysis in this case.

II. THE PRESUMPTION AGAINST PRE-EMPTION STANDS UNREBUTTED.

A. Conflict pre-emption principles impose a stringent standard.

There being no express pre-emption, conflict pre-emption principles govern herein. But it is overly simplistic to assert, as John does, that "State law is pre-empted to the extent of any conflict with a federal statute." Br. 14, quoting *Hillman*, 133 S.Ct. at 1949-1950. "Any conflict" is not to be taken literally. For example, "[a] mere conflict in words is not sufficient." *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 581 (1979). Therefore, what constitutes a pre-empting conflict must be examined. The sentence quoted above from *Hillman* is immediately followed by the explanation that "a conflict occurs when compliance with both federal and state regulations is impossible, or when the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hillman*, 133 S.Ct. at 1949-1950 (internal quotes and citations omitted). Of those two tests, only a question of "purposes and objectives" pre-emption is raised herein.

The standard for determining whether state law conflicts with federal law, and is therefore pre-empted, is stringent and multi-faceted. As stated in *Hisquierdo*:

> On the rare occasion when state family law has come into conflict with a federal statute, this Court has limited review under the Supremacy Clause to a determination whether Congress has "positively required by direct enactment" that state law be pre-empted. A mere conflict in words is not sufficient. State family and family-property law must do "major damage" to "clear and substantial" federal interests before the Supremacy Clause will demand that state law be overridden.

439 U.S. at 581 (citations omitted).

Subsequent cases are in accord. *E.g.*, *Hillman*, 133 S.Ct. at 1950; *Mansell*, 490 U.S. at 587; *Rose v. Rose*, 481 U.S. 619, 625 (1987); *McCarty*, 453 U.S. at 220.

Furthermore, "[t]he approach [to pre-emption] must be practical. The federal nature of the benefits does not by itself proscribe the entire field of state control. * * * The pertinent questions are whether the right as asserted conflicts with the express terms of federal law and whether its consequences sufficiently injure the objectives of the federal program to require nonrecognition." *Hisquierdo*, 439 U.S. at 583.

Finally, "community property regimes . . . implement policies and values lying within the traditional domain of the States." *Boggs v. Boggs*, 520 U.S. 833, 840

(1997). Those "considerations inform [the] pre-emption analysis." *Id.*

B. Here there is no conflict of federal and state law.

1. Agreements between spouses to divide MRP do not conflict with the USFSPA.

The USFSPA does not pre-empt agreements between spouses to divide MRP. On the contrary, by authorizing the States to treat MRP as community property and divide it, Congress implicitly authorized spouses to agree on the division and necessarily authorized state courts to enforce or modify the ensuing decrees. That is of paramount importance herein because John and Sandra agreed to an equal division of MRP *before* he waived any MRP to receive disability benefits.[1] Therefore, John previously acknowledged that his agreement with Sandra gave her a vested interest in the MRP that he could not, under Arizona case law, unilaterally divest. Pet. App. 35a.[2]

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[1] Settlement agreements are to be encouraged in domestic relations cases. Indeed, they are expressly promoted by statute in Arizona. A.R.S. § 25-317(A). Accordingly, they are binding on the court if they are fair. A.R.S. § 25-317(B). John has never contended that his agreement with Sandra was not fair.

[2] Sandra had a vested interest even without an agreement because, under Arizona law, the MRP was deferred compensation earned during marriage and therefore community property. The amount of her vested interest was established by the Decree, which created an immediate right to future payment. Pet. App. 12a-13a.

Given the history of federal deference to state law regulation of domestic relations, it follows that the subset of contracts between spouses regarding their family property is also within the protected domain of state law. In other words, state contract law in the domestic relations context is presumptively not preempted by federal legislation.

McCarty did nothing to affect contracts between spouses and the application of state law to them. It merely held that federal statutes then governing MRP prevented state courts from treating it as community property. Notably, *McCarty* did not involve an agreement between divorcing spouses to divide MRP. Instead of agreeing to divide MRP, the parties disputed whether Col. McCarty's MRP was his separate property, and therefore the issue was litigated and adjudicated. 453 U.S. at 217. *McCarty* did not void an agreement and did not hold that spouses could not agree to divide MRP like any other pension when divorcing.

Likewise, the USFSPA does not prohibit agreements between a service member and a spouse to divide MRP. The Act only "sought to change the legal landscape created by the *McCarty* decision." *Mansell*, 490 U.S. at 587. That new landscape merely prevented state courts from treating MRP as community property; it did not prevent contracts between spouses. Because *McCarty* did not affect contracts between spouses, neither did the USFSPA. Specifically, the USFSPA does not positively preclude an agreement for

the division of MRP made before any waiver to receive disability benefits.[3]

Although *Mansell* involved an agreement to divide MRP, its narrow holding does not prohibit all such agreements. The Mansells agreed to a division of "total military retirement pay," including MRP previously waived to receive disability benefits. The ensuing decree ran afoul of the USFSPA because it went too far by dividing disability benefits. However, *Mansell*'s narrow holding "that the Former Spouses' Protection Act does not grant states the power to treat as property divisible upon divorce military retirement pay that has been waived to receive veterans' disability benefits," 490 U.S. at 494-495, stops there. It does not mean that all agreements to divide MRP are prohibited by the USFSPA. Neither does it limit the spouses' freedom to agree to divide MRP that is properly divisible. An agreement to divide MRP is ineffective only if it includes disability benefits, as did the agreement in *Mansell*.

In sum, the state law of contracts was not altered by *McCarty*, the USFSPA, or *Mansell*. Multiple state courts have agreed. *E.g.*, *Shelton v. Shelton*, 119 Nev. 492, 493, 78 P.3d 507, 508 (2003), *cert. denied*, 541 U.S. 960 (2004) ("We conclude that, although courts are prohibited by federal law from determining veterans'

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[3] The USFSPA only prohibits contracts between a spouse and a third party: "Section 1408(c)(2) prevents a former spouse from transferring, selling, or otherwise disposing of her community interest in the military retirement pay." *Mansell*, 490 U.S. at 590.

disability pay to be community property, state law of contracts is not preempted by federal law."); *Gatfield v. Gatfield*, 682 N.W.2d 632 (Minn. App. 2004), *review denied* ("*Mansell* does not prevent state courts from enforcing the stipulated provisions of a dissolution judgment."); *Krapf v. Krapf*, 439 Mass. 97, 108, 786 N.E.2d 318, 326 (2003) ("The judgment in this case does not divide the defendant's VA disability benefits in contravention of the *Mansell* decision; the judgment merely enforced the defendant's contractual obligation to his former wife, which he may satisfy from any of his resources."); *Abernathy v. Fishkin*, 699 So.2d 235, 240 (Fla. 1997) ("while federal law prohibits the division of disability benefits, it does not prohibit spouses from entering into a property settlement agreement that awards the non-military spouse a set portion of the military spouse's retirement pay."); *In re Marriage of Stone*, 274 Mont. 331, 336, 908 P.2d 670, 673 (1995) (same).

Agreements to divide MRP are thus within the province of state domestic relations and contract law. Consequently, this Court has no jurisdiction over the Howell's settlement agreement, its incorporation in the Decree, or the family court's 2014 Order modifying that Decree to ensure that Sandra receive the benefit of her bargain.

Because *Mansell* does not prohibit agreements to divide MRP, it does not prevent the creation of a vested interest in MRP by such an agreement. John's argument that a spouse cannot have a contractually vested interest in unwaived MRP ignores basic contract law

and the importance of the timing of the agreement. As discussed, a service member and spouse are free to contract to divide total MRP before any waiver. Once they do so, the spouse has a vested interest and the service member cannot unilaterally act to affect that interest. If the service member later becomes disabled, he or she is not required to claim or accept disability benefits. But if he or she chooses to do so for the tax benefits, the earlier agreement implicitly requires that only the service member suffer the reduction in MRP. In other words, even though a service member has "an absolute right to waive MRP in order to receive disability pay," Br. 47, he or she has no right to do so and thereby cause his or her spouse to suffer a reduction of MRP in breach of a promise to that spouse. While a waiver of MRP during marriage will reduce the value of the community interest, a waiver after an agreement to divide MRP cannot reduce a contractually vested interest.

As the Arizona Supreme Court stated, "Sandra had a vested right to receive future distributions of her share of MRP unencumbered by any adjustments initiated by John." Pet. App. 12a. Sandra's vested interest is critical because she agreed to receive spousal maintenance for only a limited period of time – until John retired and she would receive her share of the MRP. Pet. App. 43a. Had she known that John could later unilaterally reduce her interest, no doubt she would have made a different bargain. Also, the parties' agreement to terminate spousal maintenance and substitute MRP, and the family court's later finding that "[Sandra] was dependent on and expecting [one-half of

MRP]," Pet. App. 33a, indicate that the parties did not intend by their agreement that Sandra's dollar share of MRP could be reduced.

Whatever the reason for Congress' decision to shelter from community property law that portion of military retirement pay previously waived to receive veterans' disability payments, it cannot extend to MRP that has been divided, and thus vested in the non-military spouse, before any waiver. Because the USFSPA lacks any positive provision compelling such an extension, any court that would so apply the USFSPA would thereby deprive the spouse of vested property without due process.

Finally, John's hypothetical comparing two divorced, disabled veterans, one who receives MRP and the other who does not, Br. 47-48, is seriously flawed. First, the MRP difference makes one veteran an apple and the other an orange. Second, the hypothetical is not relevant to this case because the veteran receiving MRP is not bound by an agreement to share it with a former spouse. Third, both veterans receive and get to keep their disability benefits. An indemnification order regarding MRP does not affect the first veteran's actual receipt of disability benefits. Finally, the hypothetical does not consider the first veteran's other assets that could be used to satisfy the indemnification order.

2. Indemnification orders do not conflict with the purposes and objectives of the USFSPA.

(a) The primary purpose is to benefit the non-military spouse.

The primary purpose of the USFSPA was to authorize state courts to again treat MRP as community property and thereby allow its division for the benefit of a veteran's spouse. Such treatment had been stopped by *McCarty*, which concluded that "the application of community property law conflicts with the federal military retirement scheme. . . ." 453 U.S. at 223. The USFSPA was intended to "have the effect of reversing" *McCarty*. H.R.Conf.Rep. No. 97-749, p. 165 (1982).

The USFSPA's primary purpose is expressly stated in the legislative history:

> The primary purpose of the bill is to remove the effect of . . . *McCarty v. McCarty*. The bill would accomplish this objective by permitting . . . courts, consistent with the appropriate laws, to once again consider military retirement pay when fixing the property rights between the parties to a divorce. . . .

S.Rep. No. 97-502, p. 1 (1982).

That purpose is manifested in the grant of authority to treat MRP as community property. 10 U.S.C. § 1408(c). Needless to say, fulfillment of that purpose only benefits a service member's spouse. It does not

benefit the service member, whose MRP would be separate property but for the USFSPA.

The USFSPA's intent to benefit the spouses of service members is also demonstrated by its other provisions. One provides that some former spouses receive their payments of MRP directly from the military. 10 U.S.C. § 1408(d)(1). Other provisions in the original enactment authorized participation in a service member's surviving dependent's annuity plan, and provided medical benefits and commissary and post exchange privileges. Pub. L. No. 97-252, Title X, §§ 1003-1005, 96 Stat. 730 (1982).[4] The intent to benefit spouses is emphasized by the law's title – the Uniformed Services Former Spouses' Protection Act.

In contrast, protection of a veteran's disability benefits was not an expressly stated objective of the USFSPA; likely because there was no need to do so. The USFSPA excludes from division as community property MRP that had already been waived to receive disability benefits, but it does not otherwise explicitly protect disability benefits from division on divorce. The likely reason for both – what the USFSPA did and did not do – is that Congress understood military disability benefits to be separate property, a "personal entitlement" payable to the member, just as MRP was under *McCarty*. Thus, John is incorrect in his assertion that

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[4] Those benefits may have changed over time, but any subsequent amendments are irrelevant to the current issue. *See* 10 U.S.C. §§ 1408(h)(9)(a), 1447, 1448, 1450, and 1072.

"the statute's purpose is to ensure that veterans keep all of their disability pay." Br. 26.[5]

(b) No conflict exists.

Enforcing or modifying a divorce decree to require a veteran to honor an agreement to share MRP with a former spouse does not conflict with the purposes and objectives of the USFSPA. As previously noted, the *primary* purpose of the USFSPA was to re-authorize the division of MRP for the benefit of former spouses. If a state's law treats MRP as community property and a state court decrees a division, it follows that the beneficial objective of the USFSPA is furthered by any subsequent court order necessary to maintain and effect the division.

An indemnification order certainly does not do "major damage" to "clear and substantial" federal interests. Indeed, little federal interest remains after the service member retires, and what interest does remain is neither substantial nor damaged.

The purposes of the nondisability retirement systems of the various armed services are, in summary, to recruit, retain, retire, and provide for members. *McCarty*, 453 U.S. at 212-213. Once a member retires, all of those federal interests, except the last, cease. While the interest in providing for retired members

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[5] This Court has said that "the Veteran's Benefits provisions of Title 38 [do not] indicate unequivocally that a veteran's disability benefits are provided solely for that veteran's support." *Rose v. Rose*, 481 U.S. at 636.

continues, it is not damaged by any division of MRP because Congress has authorized its division.

An eligible service member is "entitled to retired pay." *E.g.*, 10 U.S.C. §§ 3929 (Army), 6325-6326 (Navy), 8929 (Air Force). If that service member lives in a state that treats MRP as community property, the spouse has an interest in it. When MRP is divided by decree, whether pursuant to a settlement agreement or litigation, each spouse's interest is thus defined. If the retired member later elects to waive MRP to receive disability benefits and the state court orders the member to indemnify the spouse for the reduction in MRP, the federal interest of providing for the retired member is not damaged.

In fact, the member is better off because the disability benefits are not taxed. To use this case as an example, John receives one-half of the reduced MRP and all of the disability benefits. After his "make-up" payment to Sandra, John is left with the same gross amount as her, but he pays no tax on the disability benefits portion.

Even if a purpose of the USFSPA was to ensure that veterans keep all of their disability pay, an indemnification order does not conflict with that purpose. John's conflict argument is based on nothing more than the mere fact that the amount to be reimbursed to Sandra is equal to one-half of the amount of MRP he waived to receive disability benefits. But those amounts are necessarily the same. Therefore, John's economic equivalent premise is a fiction that does not

support his conclusion that the order effects a division of disability benefits. In fact, as John admits, he keeps all of his disability benefits. "[T]he decree (sic) did not directly interfere with [John's] receipt of his disability pay. . . ." Br. 24.[6]

Moreover, John's conclusion is wrong because the indemnification order does not require reimbursement from any particular source of funds. In the words of two learned commentators, "[t]he retiree . . . is free to reimburse the former spouse with any income or assets at his disposal. Thus, there is no implicit division of the disability benefits in contravention of *Mansell v. Mansell*." Mark E. Sullivan & Charles R. Raphun, *Dividing Military Retired Pay: Disability Payments and the Puzzle of the Parachute Pension*, 24 J. AM. ACAD. MATRIM. LAW. 147 (2011).[7] As John admits, indemnification orders can be satisfied out of the veteran's "general assets." Br. 18.

And as the Arizona Supreme Court correctly observed, "Sandra was awarded fifty percent of the MRP years before John unilaterally elected to receive disability pay in lieu of a portion of MRP" and the "Order did not divide the MRP subject to the VA waiver . . . or direct him to pay any amount to Sandra from his disability pay." Pet. App. 7a. Other states agree that the "make-up" payment can come from assets other than

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[6] When the sentence is read in context, the "decree" undoubtedly refers to the indemnification order.

[7] Sullivan is a Fellow of the American Academy of Matrimonial Lawyers. Raphun, an attorney, is also a Colonel in the United States Army Reserve.

disability benefits. *E.g.*, *Hayward v. Hayward*, 868 A.2d 554, 561 (Pa. Super. Ct. 2005); *Whitfield v. Whitfield*, 373 N.J. Super. 573, 862 A.2d 1187 (2004); *Troxell v. Troxell*, 28 P.3d 1169, 1172 (Okla. Civ. App. 2001); *Krapf v. Krapf*, 439 Mass. 97, 108, 786 N.E.2d 318, 326 (2003); *Hisgen v. Hisgen*, 554 N.W.2d 494, 498 (S.D. 1996); *McHugh v. McHugh*, 124 Idaho 543, 861 P.2d 113 (App. 1993) (increasing percentage of MRP award); *Owen v. Owen*, 14 Va. App. 623, 627, 419 S.E.2d 267, 270 (1992).

The conflict imagined by John is contradicted by the logical scope of the intent of Congress. The USFSPA only placed previously waived MRP outside the bounds of community property and thus beyond the reach of state courts. Given the concern of Congress for the former spouses of retired service members, it could not have intended to allow a service member to obtain a divorce decree dividing MRP, then apply for disability benefits and, when those benefits are granted, waive MRP, leaving the former spouse without a state court remedy against non-disability benefit assets.

(c) *Wissner*, *Ridgway*, *Hisquierdo*, and *Hillman* are not controlling.

Contrary to John's position, *Wissner v. Wissner*, 338 U.S. 655 (1950), *Ridgway v. Ridgway*, 454 U.S. 46 (1981), *Hisquierdo*, and *Hillman* do not resolve this case. Each is meaningfully distinguishable, most importantly because none of them involved an agreement

between the service member and a spouse, as does this case.

Wissner, *Ridgway*, and *Hillman* each involved the designation of life insurance beneficiaries and gave priority to the insured service member's or federal employee's choice of beneficiary. None of those cases involved a divorce. Had the insured and the spouse agreed in the context of divorce that the member would designate the spouse as the beneficiary, the analysis and result would no doubt have been different. Just as this Court has respected the insured's "freedom of choice" of beneficiary to ensure that insurance proceeds will actually belong to the designated beneficiary, *Hillman*, 133 S.Ct. at 1952, this Court must also respect John's "freedom of contract" to divide MRP with Sandra.

Wissner, *Ridgway*, and *Hillman* also support Sandra by analogy. Pursuant to her settlement agreement with John, she was as to one-half of his MRP as a designated beneficiary is to a decedent's life insurance proceeds. Thus, what she bargained for must also actually belong to her.

Although *Hisquierdo* was a divorce case, the parties did not agree to any division of the husband's railroad retirement benefits. Instead, whether those benefits were community property was disputed and litigated. Therefore, like *Wissner*, *Ridgway*, and *Hillman*, *Hisquierdo* is also distinguishable from this case by the absence of a decisive agreement between the parties.

Hisquierdo is further distinguished by a "critical" provision of the Railroad Retirement Act. It contains "a flat prohibition against attachment and anticipation," 439 U.S. at 582, that "plays a most important role in the statutory scheme," *id.* at 583-584. That provision, 45 U.S.C. § 231m, states that:

> [N]otwithstanding any other law of the United States, or of any State, . . . no annuity or supplemental annuity shall be assignable or be subject to any tax or to garnishment, attachment, or other legal process under any circumstances whatsoever, nor shall the payment thereof be anticipated.

That provision, as this Court held, conflicted with the community property interest sought by the wife. 439 U.S. at 590. But that provision has no counterpart in the USFSPA.

III. THE USFSPA DISTINGUISHES BETWEEN DIVISIONS OF MRP MADE BEFORE AND AFTER A WAIVER OF MRP.

The USFSPA authorizes state courts to divide a service member's "disposable retired pay" with his spouse in accordance with state law. 10 U.S.C. § 1408(c)(1). "Disposable retired pay" is defined as "the total monthly retired pay to which a member is entitled" minus certain deductions. The relevant deduction in this case is any amount "deducted from the retired pay . . . as a result of a waiver of retired pay . . . to receive [disability] compensation. . . ." 10 U.S.C. § 1408(a)(4)(C).

Those provisions allow a state court to divide two distinct categories of MRP: (1) total MRP and (2) total MRP less the amount waived to receive disability benefits. Each category has a temporal character relative to any waiver. The first is MRP before any waiver and the second is MRP after a waiver. As to the second category, when the statutory definition speaks of MRP less an amount "deducted . . . as the result of a waiver," it does so in the past tense in reference to a waiver that has occurred. As this Court held in *Mansell*, "the Former Spouses' Protection Act does not grant states the power to treat as property divisible upon divorce military retirement pay *that has been waived* to receive veterans' disability benefits," 490 U.S. at 494-495 (emphasis added).

Timing of any division of MRP is of great consequence. Timing determines what MRP can be divided. How the available MRP is divided then determines the extent of the state law property right of the nonmilitary spouse.

In Arizona, MRP is "a form of deferred compensation." Pet. App. 12a.[8] "Thus, the MRP earned during the parties' marriage belong[s] to the community and [is] divisible upon dissolution of the marriage." *Id.* Once divided, the decree creates "an immediate right to future payment." Pet. App. 13a. The decreed share of MRP is

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[8] *Accord Barker v. Kansas*, 503 U.S. 594, 603 (1992) ("the premise behind permitting the States to apply their community property laws to military retirement pay is that such pay is deferred compensation for past services"), citing *McCarty*.

therefore "vested as [the spouse's] property right. . . ." *Id.*

Because Congress authorized the States to divide MRP according to state law, the result, at least in Arizona, is that when total MRP is divided before any waiver, the non-military spouse has "a vested right to receive future distributions of her share of MRP unencumbered by any adjustments initiated by [the veteran]." Pet. App. 12a.[9]

Post-divorce waivers of MRP cannot affect a spouse's vested right. And state court orders, whether in the nature of enforcement or modification of the decree, to remediate the division of property that the USFSPA authorized but the veteran disrupted, do not violate the USFSPA. Indeed, such orders are consistent with the primary purpose of the USFSPA to protect and benefit former spouses.

As the Arizona Supreme Court noted, "[n]othing in the USFSPA directly prohibits a state court from ordering a veteran who makes a post-decree VA waiver to reimburse the ex-spouse for reducing his or her share of MRP." Pet. App. 8a. A direct prohibition is necessary to pre-emption of the states' authority to remedy a veteran's unilateral reduction of an ex-spouse's vested interest in property. Because the prohibition in

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[9] Whether a veteran in Arizona can, during marriage, unilaterally waive a portion of the marital community's interest in MRP, and what the spouse's interest in the remaining MRP would be if they later divorce, are different and unanswered questions that are not before this Court.

the USFSPA is expressly limited to the division of waived MRP, but does not positively pre-empt relief to rectify a post-decree dilution of an ex-spouse's vested share of MRP, it does not preclude state court indemnification orders that do not divide disability benefits.

The analysis simply ends there. Accordingly, it is unnecessary to further address John's arguments and hypotheticals in section II.A of his brief.

IV. STATE COURTS MUST HAVE FLEXIBILITY TO FASHION EQUITABLE REMEDIES APPROPRIATE TO EACH CASE.

John sought disability benefits some thirteen years after his divorce from Sandra and the division of their marital community estate. Sandra did not move to enforce the decree for eight years more. At either point in time it was likely impractical, if not impossible, to equitably redistribute the estate in kind to account for John's unilateral waiver of MRP awarded to Sandra. The only practical remedy available to the family court was a monetary indemnification order.

The indemnification order herein making John "responsible for ensuring [Sandra] receive her full 50% of the military retirement without regard for the disability," Pet. App. 28a, does not divide or otherwise directly affect John's disability benefits. As the Arizona Supreme Court noted, the "Order did not divide the MRP subject to the VA waiver, order John to rescind the waiver, or direct him to pay any amount to Sandra from his disability pay." Pet. App. 7a.

John can simply indemnify Sandra from his other assets. "'Nothing' in the Former Spouses' Protection Act relieves military retirees of liability under such law if they possess other assets equal to the value of the former spouse's share of gross retirement pay." *Mansell*, 490 U.S. at 601 (O'Connor, J., dissenting.) No finding was made that John has no other assets, and he did not make that argument. Nor could he because he has at least his own share of the MRP.

Although the indemnification order did not direct John to pay Sandra from his share of the MRP, such an order would not be prohibited by the USFSPA:

> Nothing in this section [10 U.S.C. § 1408] shall be construed to relieve a member of liability for . . . payments required by a court order on the grounds that payments made out of disposable retired pay under this section have been made in the maximum amount permitted under [the direct payments mechanism]. Any such unsatisfied obligation of a member may be enforced by any means available under law other than the means provided under this section in any case in which the maximum amount permitted under . . . [the direct payments mechanism] has been paid.

10 U.S.C. § 1408(e)(6).

That "savings clause" defeats "any inference that the [USFSPA's] federal direct payments mechanism displaced the authority of state courts to divide and garnish property not covered by the mechanism." *Mansell*, 490 U.S. at 590. Thus, a state court order can

properly be directed at MRP not being paid directly to Sandra, in other words, MRP paid to John. At least one state court has relied on the savings clause to support an order of indemnification from assets other than disability benefits. *Troxell v. Troxell*, 28 P.3d at 1171 (Okla. Civ. App. 2001).

John misapprehends Sandra's savings clause argument, which is different than the argument made by Mrs. Mansell and rejected by this Court. *Mansell*, 490 U.S. at 590. Indeed, *Mansell*'s interpretation of the savings clause, *id.*, directly supports Sandra's position that the state court can order John to pay her from his share of the MRP. Therefore, Sandra does not invite the Court to "overrule *Mansell*'s interpretation of the savings clause." Br. 51. Neither does she argue that the savings clause authorizes "state courts to treat waived MRP as divisible property." *Id.* John is mistaken in attributing those arguments to Sandra.

CONCLUSION

The Arizona Supreme Court's decision is correct and should be affirmed.

Respectfully submitted,

CHARLES W. WIRKEN
Counsel of Record
GUST ROSENFELD, PLC
One E. Washington
Suite 1600
Phoenix, AZ 85004-2553
(602) 257-7959
cwirken@gustlaw.com
Counsel for Respondent

RECORD AND BRIEFS

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JOHN HOWELL,
Petitioner,

v.

SANDRA HOWELL,
Respondent.

On Writ of Certiorari to the Arizona Supreme Court

REPLY BRIEF OF PETITIONER

KEITH BERKSHIRE
BERKSHIRE LAW OFFICE
5050 N. 40th St.,
Suite 340
Phoenix, AZ 85018
(602) 396-7669

ADAM G. UNIKOWSKY
Counsel of Record
EMMA P. SIMSON
JENNER & BLOCK LLP
1099 New York Ave., NW
Suite 900
Washington, DC 20001
(202) 639-6000
aunikowsky@jenner.com

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I. THIS CASE INVOLVES MODIFICATION, NOT ENFORCEMENT, OF A DECREE.

Respondent's brief mischaracterizes the facts of this case. Respondent frames the question presented as whether "[a]greements between spouses to divide MRP ... conflict with the USFSPA." Resp. Br. 14. She claims she is merely seeking "what she bargained for," and that *Mansell* does not "limit the spouses' freedom to agree to divide MRP." *Id.* at 16-17, 27. Her bottom line is that "this Court must ... respect [Petitioner's] 'freedom of contract' to divide MRP with [Respondent]." *Id.* at 26.

However, the Arizona Supreme Court was *not* enforcing the parties' bargain or vindicating Petitioner's "freedom of contract," because the original decree did *not* divide Petitioner's waived MRP or provide Respondent with a right to indemnification. The decree stated that Respondent would receive half of Petitioner's monthly MRP payments from the federal government—*i.e.*, half of his disposable MRP. Pet. App. 41a. It said nothing about reimbursement for any future waiver.

The Arizona Supreme Court therefore explained that "[i]t was not necessary to 'enforce' the decree," as Respondent had requested, because the agency distributing the MRP "was honoring its terms." *Id.* at 10a.[1]

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[1] That state-law interpretation of the decree binds this Court. *Wainwright v. Goode*, 464 U.S. 78, 84 (1983) (per curiam) ("[T]he

Rather than enforce the decree as written, however, the divorce court "modified the original property disposition terms" by inserting a new provision—to which Petitioner never agreed[2]—directing Petitioner to indemnify Respondent for his MRP waiver. Pet. App. 10a. The Arizona Supreme Court upheld that modification, explaining that by virtue of Petitioner's military service during the marriage, Respondent had acquired a community property interest in 50% of Petitioner's total MRP, and her interest "vested" upon entry of the decree because it could be calculated with certainty. Pet. App. 11a-13a.

The Arizona Supreme Court's reasoning did not depend on the fact that the parties had signed a contract; it would have applied with identical force to a litigated decree. Indeed, the court mentioned that the parties had settled only once, in the facts section. Pet. App. 2a.

The distinction between enforcing and modifying a settlement agreement is important. Although the question is not presented here, an express-indemnification provision in a settlement agreement

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views of the state's highest court with respect to state law are binding on the federal courts.").

[2] Respondent states that Petitioner "acknowledged that his agreement with [Respondent] gave her a vested interest in the MRP that he could not ... unilaterally divest." Resp. Br. 14. Not so. Petitioner's position below was that Respondent "has a vested right in fifty percent of whatever amount of MRP is paid by DFAS each month." Pet. App. 11a. It was *Respondent* who successfully argued below that Petitioner could not unilaterally reduce her MRP. *Id.*

might well be enforceable. The argument for enforcing such a provision is straightforward: When a veteran voluntarily promises to indemnify his ex-spouse for waived MRP, he waives his statutory rights under the USFSPA. The USFSPA is not a straightjacket that prevents a veteran from voluntarily making an enforceable promise to indemnify his ex-spouse. And when a court enforces such a promise, it merely enforces the veteran's prior waiver; it does not illegally divide waived MRP. Just as a court violates the First Amendment if it prohibits a person from criticizing his employer but does not violate the First Amendment if it enforces a contractual non-disparagement clause, a divorce court violates the USFPSA if it divides waived MRP but does not violate the USFSPA if it enforces a veteran's contractual promise to indemnify his ex-spouse for waiving MRP.[3]

This point should not be a surprise to Respondent. At the certiorari stage, Petitioner explained that this case did not present the "analytically distinct question" of whether an express indemnification provision was enforceable, because the Arizona Supreme Court "went out of its way to hold that, as a matter of state law, the

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[3] Respondent notes that in *Mansell*, Mr. Mansell sought to reopen a settlement decree, to which he had originally acquiesced, dividing waived MRP. Resp. Br. 16. But this Court did not hold that voluntary settlement agreements involving divisions of waived MRP were unenforceable. To the contrary, it left open the possibility that state-law res judicata principles would preclude him from reopening the decree, *Mansell v. Mansell*, 490 U.S. 581, 586 n.5 (1989), and the state court so held on remand. *In re Marriage of Mansell*, 265 Cal. Rptr. 227 (Ct. App. 1989).

divorce court's order modified the decree, and did not enforce a pre-existing indemnification provision." Pet. 30-32.

Yet Respondent spends her entire brief attacking the straw man that divorce settlements should be enforced, while relegating the Arizona Supreme Court's actual justification for its holding to a cursory footnote. Resp. Br. 14 n.2.

II. THE DIVORCE COURT'S ORDER VIOLATES THE USFSPA.

A. The Divorce Court Divided Petitioner's Waived MRP.

The actual question presented is whether a divorce court may, over a veteran's objection, modify a decree to order him to reimburse his ex-spouse for the exact amount she stopped receiving as a result of an MRP waiver.

The answer is no. Neither Respondent nor the government grapple with Petitioner's lead argument (Pet. Br. 16-18): the divorce court's order directly violates federal law.

The USFSPA prohibits a divorce court from dividing any "amounts which ... are deducted from ... retired pay ... as a result of a waiver of retired pay required by law in order to receive compensation under ... title 38." 10 U.S.C. §1408(a)(4)(B).

In this case, however, the divorce court ordered Petitioner to "ensur[e] [Respondent] receive[s] her full 50% of the military retirement without regard for the disability [waiver]." Pet. App. 28a. That order was the

same as an order dividing waived MRP. If the divorce court's order stated that "the decree is hereby modified so that waived MRP is now divided," the effect of such an order would be identical to the actual order entered here: In both instances, Petitioner would have to pay Respondent, out of his general assets, half of the amount waived to receive disability pay. Pet. Br. 16-18.

Notably, neither Respondent nor the government disputes that the divorce court's order was the dollar-for-dollar equivalent of an order dividing Petitioner's waived MRP.

B. The USFSPA's Preemption Provision Applies to Post-Divorce Waivers.

Respondent advances only one statutory argument to try to contradict this straightforward reasoning, and it is startling.[4] Petitioner's brief pointed out that the Arizona Supreme Court's holding was tantamount to a holding that the USFSPA's prohibition on dividing waived MRP does not apply to post-divorce waivers. Pet. Br. 27-29. Rather than dispute this characterization, Respondent runs with it; she claims that divorce courts are free to divide waived MRP, so long as the waiver occurs after the decree. She

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[4] Respondent briefly contends that the USFSPA's "saving clause" supports the indemnification order because Petitioner could satisfy it via assets other than his disability pay. Resp. Br. 31-32. As Petitioner's brief explained, that interpretation is irreconcilable with *Mansell*. Pet. Br. 50-51. Indeed, under Respondent's interpretation of the saving clause, Mrs. Mansell would have prevailed: the order in *Mansell* merely divided Mr. Mansell's waived MRP, while containing no obligation to satisfy it via Mr. Mansell's disability benefits. 490 U.S. at 585-86.

maintains that because the statutory definition of disposable MRP is written in the present tense, the USFSPA only bars a divorce court from dividing MRP that has already been waived at the time of a decree, and permits division of MRP that may be waived in the future. Resp. Br. 28; *see* Gov't Br. 15 (same).

This theory is novel. In the 35 years since the USFSPA's enactment, Petitioner is aware of no court that has ever adopted Respondent's interpretation.

On its merits, this argument is both irrelevant and incorrect. It is irrelevant because, in this case, it was the modification order, not the original decree, that divided Petitioner's waived MRP. The USFSPA plainly applies to modification orders. *See* 10 U.S.C. §1408(a)(2) (defining "court order" to include "a final decree modifying the terms of a previously issued decree of divorce"); *cf. id.* §1408(d)(7) (provision specifically addressed to modification orders). And the modification order occurred *after* the MRP waiver. Thus, even under Respondent's interpretation, the modification order impermissibly divided Petitioner's waived MRP.

Respondent's argument is incorrect because the USFSPA prohibits a divorce court from dividing waived MRP, regardless of whether the waiver predates or postdates the division order. Pet. Br. 25-35.

Respondent's reliance on the present tense in §1408(a)(4) has a fundamental flaw. If Respondent's interpretation were correct, a divorce court would be powerless to award *any* MRP when an active-duty

servicemember, who is not yet eligible for MRP, divorces. This is because, at the time of his divorce, the "total monthly retired pay to which [the] member *is* entitled," §1408(a)(4)—present tense—is zero.

Similarly, Respondent's interpretation would mean that even if a veteran were already receiving MRP at the time of a divorce, a divorce court would be powerless to award the ex-spouse a share of future cost-of-living increases in MRP. It would only be permitted to award half of what the veteran's MRP "*is*" at the time of the divorce.

That cannot be right. The correct interpretation of the USFSPA is obvious: disposable MRP is calculated at the time MRP is paid. If a court awards a percentage share of a servicemember's disposable MRP and his disposable MRP increases after his divorce (*e.g.*, because of cost-of-living increases), the ex-spouse's share likewise increases. But if it decreases after his divorce (*e.g.*, because of a waiver), the ex-spouse's share decreases.

Indeed, §1408(a)(4) presupposes that disposable MRP will fluctuate from month to month—it requires adjustment for one-time events like "overpayments" and "recoupments." *Id.* §1408(a)(4)(A). The statute makes sense only if the calculation of divisible MRP adjusts for those events when they occur.

The fact that §1408(a)(4) is written in the present tense reflects the fact that it is a definitional provision: it defines what "[t]he term 'disposable retired pay' *means*." *Id.* §1408(a)(4) (emphasis added). So someone calculating the divisible share of MRP in a particular

month would consult, at that time, the statutory definition of what "'disposable retired pay' means." It does not mean that the amount of divisible MRP is fixed at the time of the divorce.

Mansell's statement that courts cannot divide MRP that "has been waived" does not save Respondent's argument. Resp. Br. 28 (quoting *Mansell*, 490 U.S. at 594-95). This verb tense, reflecting the facts of *Mansell*, cannot reasonably be interpreted as an implied holding that MRP waived after a divorce can be divided, an issue not before the *Mansell* Court.

Respondent's interpretation fails for four additional reasons.

1. Respondent overlooks *Mansell*'s holding that because Congress had completely preempted state law on the division of MRP, a state court can divide MRP only if it has express congressional authorization. *Mansell*, 490 U.S. at 588 ("Congress could overcome the *McCarty* decision only by enacting an affirmative grant of authority giving the States the power to treat military retirement pay as community property"); *see* Pet. Br. 37-38. Thus, for her interpretation to prevail, Respondent must show an "affirmative grant of authority" to divide MRP that is waived following a decree. She cannot make that showing. An "affirmative grant of authority" cannot be gleaned from the use of the present tense in a definitional provision and a delicate negative inference from *Mansell*'s use of verb tense.

2. Respondent's interpretation would imply that the government routinely miscalculates ex-spouses' MRP

payments. Currently, when a veteran waives a portion of his MRP, the government deducts half of the waiver from the veteran's payment, and half from the ex-spouse's payment. *E.g.*, Pet. App. 3a. Yet if Respondent was correct, the government should deduct the *entire* waiver from the veteran's paycheck, leaving the question of an indemnification remedy irrelevant.

3. Section 1408(a)(4)(B) also prohibits division of MRP waived to obtain benefits under Title 5. Such waivers occur when a veteran who obtains a civilian government job seeks to apply his years of military service towards civil, rather than military, retirement benefits. 5 C.F.R. §831.301(c). In 1996, Congress enacted legislation requiring veterans who execute such waivers after their divorce to ensure that their ex-spouses receive a portion of their civil retirement benefits—*i.e.*, effectively indemnify them for the post-divorce waiver. 5 U.S.C. §§8332(c)(4), 8411(c)(5). This provision would be unnecessary if a post-divorce waiver did not reduce an ex-spouse's share of MRP.

4. As Petitioner's opening brief explained, permitting divorce courts to divide MRP that has been waived after the divorce would effectively strip *every* active-duty servicemember who gets divorced from protection against division of waived MRP. Pet. Br. 30-31. This would be an extraordinary outcome given that the USFSPA contains numerous protections for active-duty servicemembers; for instance, it protects servicemembers from being subjected to the divorce courts of a state in which he is stationed "because of military assignment." 10 U.S.C. §1408(c)(4). Moreover, *McCarty*'s complete preemption holding was premised

on Congress' concern with the rights of divorcing active-duty servicemembers. Pet. Br. 30-31. Congress does not "hide elephants in mouseholes." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001).

The government endorses Respondent's interpretation and relies on two other statutory provisions. First, it points to prospective legislation enacted in late 2016 which ensures that when active-duty servicemembers get divorced, only their military service during the marriage—and not their military service after the divorce—counts toward calculating their ex-spouses' MRP share. Gov't Br. 15-16; Pet. Br. 41-42. This provision, which is designed to protect active-duty servicemembers, does not support the inference that Congress stripped those same servicemembers of protection over their disability pay 34 years earlier. Indeed, it directly contradicts the government's interpretation, because it defines the "total monthly retired pay to which a member *is* entitled" based on *future* changes. National Defense Authorization Act for Fiscal Year 2017, tit. VI, Pub. L. No. 114-328, §641, 130 Stat. 2000, 2164 (2016) (defining "total monthly retired pay to which a member *is* entitled" as the member's basic pay "at the time of the court order, *as increased by* ... each cost-of-living adjustment that occurs ... *between the time of the court order and the time of the member's retirement* ... ." (emphasis added)). This provision thus supports the inference that disposable MRP is to be calculated after the divorce court has entered its decree, *i.e.*, when MRP is paid.

The government also points out that the USFSPA

contemplates that divorce courts may divide MRP via numerical monthly payments. It asserts, without argument, that a numerical division in a decree could never raise federal preemption issues. Gov't Br. 16-17. In fact, it could. If a divorce court awarded an ex-spouse a dollar amount equal to half of a veteran's total MRP in order to evade *Mansell*'s restriction on dividing waived MRP—either for a pre- or post-decree waiver—such an order could surely raise a preemption question. In any event, it is hard to imagine a more oblique way for Congress to have distinguished between pre-divorce and post-divorce waivers than a statute merely observing that decrees can include numerical values.

Petitioner's brief also pointed out a series of bizarre consequences that would arise from distinguishing between pre-divorce and post-divorce waivers. For instance, it would make an ex-spouse's entitlement to reimbursement for reductions in the divorced couple's community property turn on the timing of the veteran's disability determination; favor spouses from shorter marriages, and spouses who do not rely on disability benefits during their marriages; and create an incentive to file for divorce quickly. Pet. Br. 31-35. Respondent declines to respond to these arguments, while the government merely observes that state courts may consider these facts in issuing decrees. Gov't Br. 29-30.

This is unresponsive. The USFSPA confers *federal* protection upon disabled veterans. If Congress felt state courts could adequately balance the interests of veterans and ex-spouses without federal intervention, it would not have preempted division of waived MRP at

all. The line between veterans protected by federal law, and veterans subjected to the vagaries of state divorce courts, should make sense. Respondent's proposed line does not. Congress could not have intended a veteran's federal rights to depend on the timing of a decree, or to single out for federal protection spouses from shorter marriages who did not rely on disability pay.

III. THE DIVORCE COURT'S ORDER CONFLICTS WITH THE PURPOSES OF THE USFSPA BECAUSE IT EFFECTIVELY DIVIDES PETITIONER'S DISABILITY PAY.

In the alternative, the divorce court's order conflicts with the USFSPA's purpose of ensuring that veterans keep their disability pay.

The USFSPA bars divorce courts from dividing MRP a veteran waives "to receive compensation under ... title 38"—*i.e.*, disability pay. This provision ensures that, in the context of divorce, disabled veterans keep all of their disability pay, both in form and in substance—which makes sense, given that disability pay is not deferred compensation for work performed during the marriage, but instead compensates the veteran for a present disability. Gov't Br. 20 n.10. Yet, as a result of the indemnification order, Petitioner must pay an amount equal to half of his disability pay each month to Respondent, nullifying the statute's purpose. Pet. Br. 18-24.

Moreover, all agree that disability pay is not divisible if a veteran does *not* waive MRP—for

instance, if he did not serve long enough to become eligible for MRP. Section 1408(a)(4)(B) prevents a court from, in effect, dividing disability pay if a veteran *does* become eligible for, and waive, MRP. It thus avoids the bizarre prospect of a veteran being *harmed* by becoming eligible for MRP—which, as Petitioner pointed out, is an inevitable result of Respondent's position. Pet. Br. 47-49. The government does not address this issue, while Respondent lists a grab-bag of facts about the case without disputing that Petitioner's analysis is mathematically correct. Resp. Br. 19. This analysis is due significant weight. The Court interprets statutes to avoid absurdities, and an interpretation under which eligibility for MRP can become an economic burden is an absurdity which Petitioner's interpretation avoids.

Respondent's efforts to reconcile the divorce court's order with the USFSPA's purposes are unpersuasive. Respondent first maintains that, at a high level of generality, the USFSPA's sole purpose is to "benefit the spouses of servicemembers," so its purposes cannot possibly be advanced by ruling in Petitioner's favor. This Court rejected this argument in *Mansell*. 490 U.S. at 592-94 (rejecting Mrs. Mansell's "arguments about the broad purposes of the Act" because "Congress intended both to create new benefits for former spouses and to place limits on state courts designed to protect military retirees").

Respondent next contends that the USFSPA is not intended to protect disability benefits. Resp. Br. 21-22. Of course it is. The USFSPA specifically prohibits division of MRP waived *in order to obtain disability*

pay. The only conceivable reason for such a provision is to ensure the veteran receives all his disability pay.

Respondent asserts that there is no preemption problem because "little federal interest remains after the service member retires." Resp. Br. 22. This is a strange position given that the statute bars division of waived *retirement pay*. It is even stranger in light of Respondent's position that the USFSPA protects *only* veterans who have waived MRP at the time of the divorce (*i.e.*, retired veterans), but *not* veterans who waive MRP after a divorce (which will include all divorcing active-duty servicemembers). *Supra* at 9-10.

Respondent puzzlingly states that because Petitioner's waived MRP and disability benefits are "necessarily the same," Petitioner's argument is a "fiction." Resp. Br. 23. Actually, it is *because* waived MRP and disability benefits are "necessarily the same" that the divorce court's order nullifies Congress' intent that Petitioner keep his disability benefits.

Respondent points out that the indemnification order "does not require reimbursement from any particular source of funds." Resp. Br. 24. This is irrelevant. The USFSPA prohibits division of *waived MRP*. Any time a divorce court divides waived MRP—an amount of money the veteran is no longer receiving—the veteran will have to satisfy that obligation from his general funds. Pet. Br. 18. So the fact that Petitioner must satisfy the obligation from his general funds is unhelpful to Respondent.

Moreover, this Court's cases in *Wissner v. Wissner*, 338 U.S. 655 (1950); *Hisquierdo v. Hisquierdo*, 439 U.S.

572 (1979); and *Hillman v. Maretta*, 133 S. Ct. 1943 (2013), rebut Respondent's argument by holding that if federal law confers a benefit on one person, state family courts cannot nullify federal law by requiring the person to pay an equivalent amount to someone else. Pet. Br. 20-24. These cases are dispositive. The USFSPA guarantees a veteran the right to receive 100% of his disability pay, and the divorce court's order nullifies that right by effectively requiring him to transfer 50% of it to Respondent. Respondent's sole effort to distinguish these cases is her argument that this case purportedly involves Petitioner's "'freedom of contract'" (Resp. Br. 26), which, as explained above, is demonstrably false. *Supra* at 1-4.

The government's efforts to rebut this analysis are equally unpersuasive. Beyond a passing mention in a background discussion (Gov't Br. 10-11), the government does not address *Hillman*, on which Petitioner heavily relies. Pet. Br. 12-15, 22-24, 36, 44. Notably, in *Hillman*, the government filed a brief successfully advancing the exact argument Petitioner advances here. Br. for the United States at 19-20, *Hillman v. Maretta*, 133 S. Ct. 1943 (2013) (No. 11-1221), 2013 WL 1326956 ("That conflict [between state and federal law] is not eased by the fact that [the Virginia statute], rather than intercepting the payment of proceeds in the first place, creates a cause of action against the named beneficiary only after she has received the benefits and only 'for the amount of the payment' received. ... Any other result would permit States readily to evade federal preemption principles.").

The government relies primarily on *Rose v. Rose*, 481 U.S. 619 (1987) (Gov't Br. 25-28), a case Respondent discusses only in a footnote (Resp. Br. 22 n.5.). *Rose* does not help the government.

A word of background on *Rose*: there is a difference between a family support order (like child support or alimony) and a division of community property. Family support orders are based on a spouse's or child's need. Ariz. Rev. Stat. §§25-319, 25-320. Community property divisions enforce a spouse's property interest in half of the property obtained by either spouse during the marriage, including half of any deferred compensation such as MRP. Pet. App. 12a. This Court has recognized the distinction between these concepts. *E.g.*, *Rose*, 481 U.S. at 632 (discussing case law explaining that "family support obligations are deeply rooted moral responsibilities, while the community property concept is more akin to an amoral business relationship"). The USFSPA, too, distinguishes between the two concepts. It prohibits divisions of waived MRP, but its saving clause preserves a court's right to award and enforce alimony and child support orders. 10 U.S.C. §1408(e)(6).

In *Rose*, a father was subject to a child support order that was concededly valid. He argued, however, that the order should not be enforced because he had no money to pay child support other than his service-related disability pay. The Court held that various federal statutes related to disability pay did not preempt the enforcement of the child support order. 481 U.S. at 626-35.

That holding is irrelevant here. *Rose* did not

address MRP or the USFSPA. Even if the USFSPA had been at issue, it plainly would have authorized enforcement of the child support order—that is the point of §1408(e)(6).

Moreover, unlike this case, *Rose* did not address any issue related to the division of property. Indeed, unlike this case, the veteran was not challenging a payment obligation at all: No one disputed that he owed child support. The question was whether he could shield his disability pay from a valid court order. Here, it is the validity of the court order that is in dispute.

The government points to *Rose*'s discussion of *Wissner* and *Hisquierdo* as evidence that they do not apply to this case. Gov't Br. 27-28. The government completely mischaracterizes that discussion.

The cited discussion from *Rose* addressed the veteran's argument that the federal anti-attachment statute for military disability pay preempted the enforcement order. As recounted in *Rose*, this Court's decision in *Wissner* offered "what was clearly an alternative holding," 481 U.S. at 631, that the anti-attachment statute for federal insurance proceeds precluded the application of community property principles to those proceeds, while being "careful to identify a possible exception for alimony and child support cases." *Rose*, 481 U.S. at 631-32 (citing *Wissner*, 338 U.S. at 659-60). This Court reached a similar decision in *Hisquierdo*. *Rose*, 481 U.S. at 632 (discussing *Hisquierdo*). Finally, in *Ridgway v. Ridgway*, 454 U.S. 46 (1981), this Court held that an anti-attachment statute protected life insurance proceeds from *both* community property division *and*

family support orders. *Rose*, 481 U.S. at 633-34 (discussing *Ridgway*).

In *Rose*, the Court distinguished *Ridgway*, and thus declined to interpret the anti-attachment statute so as to protect disability benefits from valid family support orders. It reasoned that "these benefits are intended to support not only the veteran, but the veteran's family as well." *Id.* at 634. Thus, "regardless of the merit of the distinction between the moral imperative of family support obligations and the businesslike justifications for community property division"—a question on which *Ridgway* had reached a different conclusion from *Wissner* and *Hisquierdo*—it held that the anti-attachment statute "does not extend to protect a veteran's disability benefits from seizure where the veteran invokes that provision to avoid an otherwise valid order of child support." *Id.*

Nothing in *Rose* suggests that *Wissner*'s primary holding—that a state cannot redirect an exclusive entitlement through community property principles—does not apply to disability pay. Rather, the question was whether the anti-attachment statute applied *only* to bar community property divisions (as *Wissner* and *Hisquierdo* held), or *also* applied to enforcement of concededly valid family support orders (as *Ridgway* held). The Court decided the former. To the extent the government interprets *Rose* to authorize a state court to treat disability pay as divisible property, it simply misunderstands that case.

This case is also distinguishable from *Rose* for a more obvious reason: it involves the USFSPA, not the anti-attachment clause. The USFSPA explicitly

prohibits division of MRP waived to receive disability pay; no such language appears in any statute at issue in *Rose*. The USFSPA's plain terms cannot be reconciled with a state court order directing a veteran to pay an amount equal to half of his disability pay each month.

IV. NEITHER THE PRESUMPTION AGAINST PREEMPTION NOR THE GOVERNMENT'S CONGRESSIONAL RATIFICATION ARGUMENT APPLIES.

The Court has found preemption in numerous family law cases, including *Mansell*, *McCarty*, *Hillman*, *Hisquierdo*, and *Wissner*. It should do so here as well. Federal preemption is so plain that any presumption against preemption has been overcome.

In any event, no presumption against preemption applies. As Petitioner's opening brief explained, *McCarty* held that state law governing the division of MRP was "completely pre-empted." *Mansell*, 490 U.S. at 588. Thus, state courts could only treat MRP as community property if Congress "affirmatively grant[ed]" them authority to do so. *Id.* There is, therefore, a presumption of *preemption*. Pet. Br. 37-38. The government suggests that this complete-preemption holding does not cover the supposedly "distinct indemnification remedy." Gov't Br. 13. But that complete-preemption holding surely covers state laws that divide MRP waived after a divorce. And if this Court agrees with Petitioner that the divorce court's order, in effect, divides his waived MRP—which neither Respondent nor the government seriously disputes—complete preemption would apply.

The presumption against preemption is also inapplicable because of Congress' strong federal interest in regulating military benefits, and its long history of legislating in this area. It is incongruous to presume that Congress did not intend to interfere with divorce law when it has repeatedly gone out of its way to interfere with divorce law, and when the USFSPA's express terms interfere with divorce law. Pet. Br. 38-44.

The government acknowledges Congress' history of legislation in this area, but tries to use that history to support a congressional ratification argument. It contends that because numerous state courts have approved indemnification orders and Congress has not overruled them, Congress has ratified the result in this case. Gov't Br. 23-25, App'x.

However, as the government's appendix itself states, the vast majority of the listed cases are "Contract Theory" cases—not the issue here, *supra* at 1-4, as the government acknowledged at the certiorari stage. CVSG Br. 21-22 n.9.

Moreover, the government's appendix is incomplete. The petition identified a 5-5 split among state supreme courts on the question presented. Of the cases on Petitioner's side of the split, one (*Clauson v. Clauson*, 831 P.2d 1257, 1264 (Alaska 1992)) is not included, and another (*Kramer v. Kramer*, 567 N.W.2d 100, 110 (Neb. 1997)) is oddly listed only as "permitting post-divorce waiver to be considered in revising alimony award." And other intermediate appellate court decisions finding federal preemption on facts similar to this case, *e.g.*, *Morgan v. Morgan*, 249 S.W.3d 226 (Mo. Ct. App.

2008), are not included.

The government's ratification argument is also weakened by Congress' 1996 enactment of an indemnification provision for waivers of MRP to receive *civil service* benefits. *Supra*, at 9. Congress could have enacted a similar provision for disability benefits, but did not.

As the government acknowledged at the certiorari stage, there is "disuniformity among state supreme courts" regarding the USFSPA's effects. CVSG Br. 13; *id.* at 20-21. There is no basis to conclude that Congress silently ratified any particular legal rule.

V. THE PRACTICAL ISSUES RAISED BY RESPONDENT AND THE GOVERNMENT ARE IRRELEVANT AND MERITLESS.

Respondent and the government raise three practical concerns that, they claim, support upholding a divorce court's right to issue an indemnification order. These concerns are not properly presented in this case, and even if they were, they would not justify an order that is squarely barred by federal law.

1. Respondent claims that the modification order should be upheld because she did not realize, when she agreed to the settlement, that her share of MRP might someday decrease: "[h]ad she known that [Petitioner] could later unilaterally reduce her interest, no doubt she would have made a different bargain." Resp. Br. 18. Respondent did not make this argument below. If she had, her factual assertion regarding her state of mind, and its legal relevance, would have been litigated.

More generally, Respondent suggests that indemnification orders are justified because ex-spouses who sign divorce settlements do not realize that their share of MRP may decrease someday. It is questionable whether this is really a systematic problem. Hundreds of thousands of veterans have waived MRP in favor of disability compensation. Pet. for Cert. 28. The possibility that a veteran might waive MRP is hardly unforeseeable—as evidenced by the many reported cases in which ex-spouses have negotiated, presumably for consideration, express indemnification agreements as part of divorce settlements. *E.g.*, *Owen v. Owen*, 419 S.E.2d 267 (Va. Ct. App. 1992). If an ex-spouse agrees to a settlement while truly unaware that a veteran may someday become disabled, the correct remedy is a malpractice suit against her divorce lawyer for failing to explain this. *Cf.* Col. Mark E. Sullivan, Am. Bar Ass'n, *Military Pension Division: The Spouse's Strategy* 5 (2010), http://www.americanbar.org/content/dam/aba/uncategorized/family/2011_military_silentp_mpd_spouse.authcheckdam.pdf (explaining that "careful drafting of a marital settlement agreement is the key to indemnifying the nonmilitary spouse").

That said, there may be cases in which an ex-spouse signs a decree not realizing the possibility that her share of MRP could go down. But there is a solution to this problem that complies with the USFSPA. If a court finds that the ex-spouse signed the divorce settlement based on an erroneous understanding of the risks involved, the court could reopen the decree to the

extent authorized by state law, and either allow the parties to negotiate a new settlement or enter a new decree that complies with the USFSPA. *See, e.g.*, *Youngbluth v. Youngbluth*, 6 A.3d 677, 691 (Vt. 2010) (Johnson, J., concurring).

2. Respondent theorizes that she might have agreed to an artificially low amount of alimony (also known as "maintenance") based on her incorrect assumption that Petitioner would not waive MRP. Resp. Br. 18. Once again this argument is not properly presented before the Court, as it was not raised below or in the BIO. Nor is there any factual record on the basis of the alimony calculation or the parties' intentions.

Even if this argument were properly presented, it would not justify the divorce court's modification order. Rather, if a divorce court is concerned that an ex-spouse is receiving insufficient alimony, it has the option of issuing a remedy authorized by the USFSPA: a modified alimony award.

As noted above, family support orders like alimony and child support differ from divisions of property. Family support orders are pegged to the spouse's and child's current resources and needs. *See, e.g.*, Ariz. Rev. Stat. §§25-319, 25-320. They are typically temporary—lasting until the children reach majority or the ex-spouse can become economically independent—and can be modified depending on life circumstances. *See id.*; *id.* §25-327(A). The USFSPA does not interfere with a divorce court's ability to award family support. 10 U.S.C. §1408(e)(6). Thus, if as a result of a waiver of MRP (or any other reason) an ex-spouse has insufficient resources to meet her needs, she can seek

an increased support award pegged to her needs. What she *cannot* seek is a permanent monthly payment of half of the veteran's waived MRP.

However, in this case Respondent never sought increased alimony, and the divorce court did not consider any factors pertinent to alimony. Instead, it modified the decree based on Respondent's supposed property interest in Petitioner's MRP—a pure community-property theory. This case therefore does not implicate any question related to an ex-spouse's entitlement to increased alimony as a result of an MRP waiver.

3. The government theorizes that in "equitable division" states, courts can consider a pre-divorce waiver of MRP in equitably dividing the assets. Thus, an indemnification order may restore an ex-spouse to the position she would have occupied had the divorce court been aware of the waiver of MRP before the divorce. Gov't Br. 18-22, 30.

This argument is not properly presented. Arizona is a community-property state, and the Arizona Supreme Court held that Respondent was entitled to a 50% share of Petitioner's MRP—not that the divorce court was misguided in the original distribution of property. Pet. App. 12a.

It is also wrong. The government's theory is that if a veteran had waived MRP *before* the divorce, the divorce court could have increased the ex-spouse's equitable share to compensate for the MRP waiver. Thus, the argument goes, an indemnification order replicates the decree the divorce court would have

entered if the waiver had occurred before the divorce. However, it would be *illegal* for a divorce court to compensate, dollar-for-dollar, for a pre-divorce waiver of MRP by simply increasing the ex-spouse's equitable share of the rest of the estate. If this was legal, the state court could completely nullify *Mansell*. *See, e.g.*, *Halstead v. Halstead*, 596 S.E.2d 353, 356 (N.C. Ct. App. 2004). Thus, a post-divorce, dollar-for-dollar indemnification order can never replicate a decree that would have complied with federal law.

It may be, as the government contends, that a divorce court faced with a pre-divorce waiver may *generally* consider that waiver in equitably distributing the property. Likewise, it may also be that a divorce court faced with a post-divorce waiver may issue a modification order which *generally* takes account of a waiver. Neither question is presented here. The sole question presented is whether the USFSPA preempts an order that is identical to a division of waived MRP. The answer is yes, whether the waiver occurs before or after the divorce.

CONCLUSION

The judgment of the Arizona Supreme Court should be reversed.

Respectfully submitted,

KEITH BERKSHIRE
BERKSHIRE LAW OFFICE
5050 N. 40th St.,
Suite 340
Phoenix, AZ 85018
(602) 396-7669

ADAM G. UNIKOWSKY
Counsel of Record
EMMA P. SIMSON
JENNER & BLOCK LLP
1099 New York Ave., NW
Suite 900
Washington, DC 20001
(202) 639-6000
aunikowsky@jenner.com

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BRIEFS

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IN THE
Supreme Court of the United States

JOHN HOWELL,
Petitioner,

v.

SANDRA HOWELL,
Respondent.

On Petition for a Writ of Certiorari
to the Arizona Supreme Court

PETITIONER'S SUPPLEMENTAL BRIEF

KEITH BERKSHIRE
BERKSHIRE LAW OFFICE
5050 N. 40th St.,
Suite 340
Phoenix, AZ 85018
(602) 396-7669

ADAM G. UNIKOWSKY
Counsel of Record
JENNER & BLOCK LLP
1099 New York Ave., NW
Suite 900
Washington, DC 20001
(202) 639-6000
aunikowsky@jenner.com

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Brief for the United States, *Hillman v. Maretta*, 133 S. Ct. 1943 (2013) (No. 11-1221), 2013 WL 1326956 9

The Government's amicus brief correctly recommends a grant of certiorari, and the Court should follow the Government's recommendation. Although the Court sometimes grants certiorari when the Government files an invitation brief recommending a denial, it almost never denies certiorari when the Government recommends a grant. For instance, dating back to last Term, the Government has recommended grants of certiorari in six invitation briefs, and this Court has followed the Government's recommendation every time. *Endrew F. v. Douglas County School District RE-1*, No. 15-827; *Czyzewski v. Jevic Holding Corp.*, No. 15-649; *Fry v. Napoleon Community Schools*, No. 15-497; *Venezuela v. Helmerich & Payne International Drilling Co.*, No. 15-423 (Government recommended grant of certiorari, limited to third question presented; Court followed Government's recommendation); *Life Technologies Corp. v. Promega Corp.*, No. 14-1538 (Government recommended grant of certiorari, limited to second question presented; Court followed Government's recommendation); *Lightfoot v. Cendant Mortgage Corp.*, No. 14-1055. The same result is warranted here.

The Government errs, however, in recommending that the Court affirm the Arizona Supreme Court. The Government does not meaningfully grapple with the fact that the divorce court's order is economically identical to an order requiring Petitioner to pay half of his disability benefits to Respondent. Because the Uniformed Services Former Spouses' Protection Act ("USFSPA") prohibits state courts from treating

disability benefits as community property, and the divorce court's order effectively did just that, the divorce court's order is preempted by the USFSPA.

I. The Court Should Grant Certiorari.

The Government correctly states that "state supreme courts have expressed sufficiently divergent views" on the issue presented here that "the Court's review is warranted to clarify the USFSPA's preemptive scope." CVSG Br. 8. It notes that "State supreme courts have ... adopted a variety of responses to the question whether a disposition-of-property order issued at the time of divorce may subsequently be modified to account for the economic impact of a veteran's post-divorce waiver of military retirement pay and election of disability benefits." *Id.* at 20. Thus, "[t]his Court's review is warranted to clarify the extent to which disposition-of-property and spousal-support requirements may be modified to address the economic consequences of post-divorce waivers of military retirement pay." *Id.* at 21.

Indeed, the decision below directly conflicts with decisions of five other state supreme courts.

1. *Mallard v. Burkart*, 95 So. 3d 1264 (Miss. 2012). Mallard waived a portion of his military retirement pay after the parties' divorce, and Burkart sought to modify the decree to receive the same monthly payments she was previously getting. Pet. 18-20. The Mississippi Supreme Court held that federal law prohibited the modification. *Id.*; *see* 95 So. 3d at 1272 ("state law is preempted by federal law, and thus, state courts are precluded from ordering distribution of military

disability benefits contrary to federal law"). As the Government correctly states, "[t]he decision in *Mallard* thus squarely conflicts with the Supreme Court of Arizona's ruling in this case." CVSG Br. 14.

2. *Youngbluth v. Youngbluth*, 6 A.3d 677 (Vt. 2010). Bruce Youngbluth waived a portion of his military retirement pay after the parties' divorce, and Elisabeth Youngbluth sought to modify the decree to receive the same monthly payments she was previously getting. The Vermont Supreme Court held that the modification was preempted, in conflict with the decision below. Pet. 17-18.

The Government finds it "plausibl[e]" that the result in *Youngbluth* could have been driven by state law, but ultimately agrees that the Vermont Supreme Court "reli[ed] on federal preemption principles." CVSG Br. 15-16. Indeed, the *Youngbluth* court made repeatedly clear that it was relying on federal law as interpreted in *Mansell v. Mansell*, 490 U.S. 581 (1989). *See Youngbluth*, 6 A.3d at 683 ("Given that *Mansell* held that state courts are without power to divide disability benefits in a property division order, we agree with those courts that have held that in this type of situation the trial court's order cannot be read to have granted wife an interest in husband's disability benefits"); *id.* at 684-85 ("Rather than joining those courts that have found 'creative solutions' around *Mansell*, we recognize that, regardless of whether we agree or disagree with it, a decision by the United States Supreme Court on a matter of federal law is binding upon the state courts" (internal quotation marks omitted)); *id.* at 690 ("federal law is very clear

that the former spouse has no right to those amounts of retirement benefits which the former military servicemember waived so he could receive disability benefits" (internal quotation marks and alterations omitted)).

3. *Ex parte Billeck*, 777 So. 2d 105 (Ala. 2000). Edwin Billeck waived a portion of his military retirement pay after the parties' divorce, and Hellene Billeck sought to modify the decree to receive the same monthly payments she was previously getting. The Alabama Supreme Court held that the modification was preempted, in conflict with the decision below. Pet. 20-21.

As the Government explains, *Billeck* reasoned that *Mansell* does not "allow[] trial courts to consider veteran's disability benefits in awarding alimony." CVSG Br. 17 (quoting *Billeck*, 777 So. 2d at 108). The Government characterizes *Billeck* as "reflect[ing] a particularly expansive view of USFSPA preemption," *id.*, in conflict with the narrower view of USFSPA preemption in the decision below. The Government states that the order in *Billeck* "expressly directed the veteran to pay over his disability benefits (rather than simply to indemnify his ex-wife for the economic loss caused by his partial waiver of military retirement pay)." *Id.* But the Alabama Supreme Court made clear that such an indemnification order is preempted by federal law: "The state courts have reasoned that, as long as the trial court does not order the husband directly to pay his veteran's disability benefits to the wife, the trial court does not violate [the USFSPA]. This reasoning is flawed. ... [T]he trial court essentially

is awarding the wife a portion of those veteran's disability benefits; and in doing so the trial court is violating federal law." 777 So. 2d at 108-09.

4. *Clauson v. Clauson*, 831 P.2d 1257 (Alaska 1992). James Clauson waived a portion of his military retirement pay after the parties' divorce, and Dorothy Clauson sought to modify the decree to receive the same monthly payments she was previously getting. The Alaska Supreme Court held that the modification was preempted, in conflict with the decision below. Pet. 21-23. The Government states that the Alaska Supreme Court's reasoning "seems inconsistent with the indemnification remedy approved by the Supreme Court of Arizona in this case." CVSG Br. 18. This is clearly correct given that the Alaska Supreme Court reached the exact opposite conclusion from the court below in a case presenting identical facts. Pet. 21-23.

The Government points out that a subsequent Alaska case enforced an explicit indemnification provision in a divorce decree. CVSG Br. 18-19. But as Petitioner explained in his petition (Pet. 31-32), and as the Government acknowledges (CVSG Br. 22 n.9), the divorce decree here included no such provision. Indeed, the Arizona Supreme Court's explicit holding that it was modifying, rather than enforcing, the original terms of the decree is the precise feature of the case that makes it such a *good* vehicle. Pet. 31-32.

5. *Kramer v. Kramer*, 567 N.W.2d 100 (Neb. 1997). Kenneth Kramer waived a portion of his military retirement pay after the parties' divorce in 1994, retroactive back to 1992. The court ordered Kathleen to reimburse Kenneth for his disability pay from the

period from 1992 to 1994; for the period after 1994, the court adopted *Clauson*'s prohibition on "redistribution" in response to a post-divorce conversion to disability compensation. Pet. 23-25. As the Government states, the Nebraska Supreme Court adopted the rule that a divorce court may not "simply shift an amount of property equivalent to the waived retirement pay from the military spouse's side of the ledger to the other spouse's side." CVSG Br. at 19 (quotation marks omitted). Such a shift, however, is precisely what the Arizona Supreme Court authorized in this case.

* * *

Thus, as the Government recognizes, this case presents one side of a conflict of authority on the preemptive effect of the USFSPA. The Government identifies no vehicle problems and does not dispute that this case has several features that make it a particularly strong vehicle for this Court's review. Pet. 29-33. The petition should be granted.

II. The Decision Below Is Wrong.

The Government is wrong on the merits. The decision below is irreconcilable with *Mansell* and should be reversed.

Mansell held that the USFSPA "does not grant state courts the power to treat as property divisible upon divorce military retirement pay that has been waived to receive veterans' disability benefits." 490 U.S. at 594-95. As the Petition explains (Pet. 33-37), and as the Government appears to acknowledge (CVSG Br. 9-10), the divorce court's order in this case is economically identical to an order awarding half of

Petitioner's disability benefits to Respondent, which is precisely what *Mansell* prohibits. The order is therefore preempted.

The Government points out that Petitioner began receiving disability benefits after the divorce, rather than before the divorce as in *Mansell*. But under the USFSPA, a veteran is entitled to keep all of his disability pay, regardless of when he becomes disabled. The Government offers no statutory argument on why *Mansell* would apply only to pre-divorce but not to post-divorce waivers.

The Government endorses the Arizona Supreme Court's reasoning that the divorce court did not explicitly require Petitioner to pay half of his disability benefits, but instead required him to pay an amount precisely equal to half of his disability benefits. CVSG Br. 10-11. Yet it ignores that this Court has rejected this precise distinction—even in family law cases. For instance, in *Wissner v. Wissner*, 338 U.S. 655 (1950), a service member named his parents as the beneficiaries of a life insurance policy. After he died, a state court concluded that the insurance benefits were community property, and ordered the parents to pay half of the benefits to the widow. *Id.* at 658. The Court held that the state court order was preempted, rejecting the precise reasoning the Government advances in this case: "Whether directed at the very money received from the Government or an equivalent amount, the judgment below nullifies the soldier's choice and frustrates the deliberate purpose of Congress. It cannot stand." *Id.* at 659.

More recently, in *Hillman v. Maretta*, 133 S. Ct. 1943 (2013), a federal statute mandated that a federal employee's life insurance proceeds be directed to his named beneficiary. *Id.* at 1947. A Virginia statute provided that if the employee's marital status had changed, but he did not update his beneficiary designation, the employee's surviving spouse could sue the named beneficiary for the proceeds. *Id.* This Court held that the state statute was preempted, reasoning that because Congress had directed that the named beneficiary receive the money, that money "cannot be allocated to another person by operation of state law." *Id.* at 1950, 1953.

In its amicus brief in *Hillman*, the Government argued as follows:

> That conflict [between state and federal law] is not eased by the fact that [the Virginia statute], rather than intercepting the payment of proceeds in the first place, creates a cause of action against the named beneficiary only after she has received the benefits and only 'for the amount' received. ... *Wissner* found preemption even though the question was whether a judgment could be entered against the designated beneficiary for the amount of benefits that had been (and would be) paid to her. 338 U.S. at 658. ... And *Ridgway* [*v. Ridgway*, 454 U.S. 46 (1981)] found preemption even though the question was whether a constructive trust could be imposed on insurance proceeds that had already been distributed. This Court has reached the same conclusion in a

> number of other cases involving federal rights ... Any other result would permit States readily to evade federal preemption principles.

Br. for the United States at 19-20, *Hillman v. Maretta*, No. 11-1221, 2013 WL 1326956 (2013) (internal citations omitted). The Government's position in *Hillman* was correct. If federal law prohibits a state court from awarding half of a veteran's disability benefits to his ex-spouse, then an order awarding an amount identical to half of a veteran's disability benefits is preempted as well.

CONCLUSION

The petition for writ of certiorari should be granted.

November 1, 2016

Respectfully submitted,

KEITH BERKSHIRE
BERKSHIRE LAW OFFICE
5050 N. 40th St.,
Suite 340
Phoenix, AZ 85018
(602) 396-7669

ADAM G. UNIKOWSKY
Counsel of Record
JENNER & BLOCK LLP
1099 New York Ave., NW
Suite 900
Washington, DC 20001
(202) 639-6000
aunikowsky@jenner.com

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In the Supreme Court of the United States

JOHN HOWELL, PETITIONER

v.

SANDRA HOWELL

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ARIZONA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

NOEL J. FRANCISCO
Acting Solicitor General
Counsel of Record
CHAD A. READLER
Acting Assistant Attorney General
MALCOLM L. STEWART
Deputy Solicitor General
ILANA H. EISENSTEIN
Assistant to the Solicitor General
ALISA B. KLEIN
KATHERINE TWOMEY ALLEN
Attorneys

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

When the parties divorced and their property was divided, petitioner agreed that, going forward, he would pay respondent 50% of his military retirement pay each month. Petitioner later waived a portion of his retirement pay in favor of veterans' disability benefits, resulting in a reduction of the monthly payments made to respondent. The family court ordered petitioner to indemnify respondent for the amount of that reduction. The question presented is as follows:

Whether the state court's order violated the Uniformed Services Former Spouses' Protection Act, 10 U.S.C. 1408, as interpreted in *Mansell* v. *Mansell*, 490 U.S. 581 (1989).

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In the Supreme Court of the United States

No. 15-1031

JOHN HOWELL, PETITIONER

v.

SANDRA HOWELL

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ARIZONA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

INTEREST OF THE UNITED STATES

Petitioner is a veteran who waived a portion of his military retirement pay in order to receive veterans' disability benefits. One effect of that waiver was to reduce the amount of the monthly payments that petitioner made to his ex-wife (respondent in this Court) under a prior divorce decree. The question presented in this case is whether a State, consistent with the Uniformed Services Former Spouses' Protection Act, 10 U.S.C. 1408, as interpreted in *Mansell* v. *Mansell*, 490 U.S. 581 (1989), may order petitioner to indemnify respondent for the amount of that reduction. The United States has an interest in the proper resolution of that question because the military services branches and the Department of Veterans Affairs are charged with the administration of the statutes that regulate the distribution of military retirement pay and veterans' disability benefits. At the

Court's invitation, the United States filed a brief at the petition stage of this case.

STATEMENT

1. a. This case concerns two types of veterans' benefits: retirement pay and disability benefits. Members of the military who have served the requisite number of years may retire and receive retirement pay. 10 U.S.C. 3911 *et seq.* (U.S. Army); 10 U.S.C. 6321 *et seq.* (U.S. Navy and U.S. Marine Corps); 10 U.S.C. 8911 *et seq.* (U.S. Air Force). In addition, veterans who become partially or totally disabled as a result of their military service may be eligible for disability benefits. 38 U.S.C. 1110 (wartime disability); 38 U.S.C. 1131 (peacetime disability). In general, however, a military retiree may receive disability benefits only to the extent that he or she waives a corresponding amount of retirement pay. 38 U.S.C. 5305.[1] Such waivers are common because disability benefits, unlike retirement pay, are exempt from taxation. 38 U.S.C. 5301(a); see *Mansell* v. *Mansell*, 490 U.S. 581, 583-584 (1989).

b. In *McCarty* v. *McCarty*, 453 U.S. 210 (1981), this Court held that federal law preempts state courts from treating any portion of a servicemember's retirement pay as community property divisible between a servicemember and a former spouse upon divorce. *Id.* at 232-235.

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[1] Under Section 641 of the National Defense Authorization Act for Fiscal Year 2004, Pub. L. No. 108-136, 117 Stat. 1511 (codified primarily at 10 U.S.C. 1414), a servicemember who did not retire based on a determination of medical unfitness and is at least 50% disabled will be entitled to receive both retirement pay and disability benefits without waiving any portion of the retirement pay. Petitioner is 20% disabled, Pet. App. 3a, so that provision does not apply here.

Congress responded to *McCarty* by enacting the Uniformed Services Former Spouses' Protection Act (Spouses' Protection Act or Act), 10 U.S.C. 1408. The Spouses' Protection Act authorizes a state court to "treat disposable retired pay * * * either as property solely of the member or as property of the member and his spouse in accordance with the law of the jurisdiction of such court." 10 U.S.C. 1408(c)(1). The Act defines "disposable retired pay" as "the total monthly retired pay to which a member is entitled," less certain amounts, including the amount waived "in order to receive compensation under * * * title 38"—*i.e.*, the amount of retired pay waived to receive disability benefits. 10 U.S.C. 1408(a)(4)(B).

In *Mansell*, this Court construed the Spouses' Protection Act to foreclose state courts from treating as community property the portion of military retirement pay that a veteran has waived in order to receive disability benefits. See 490 U.S. at 588-589. The veteran in *Mansell* had waived a portion of his retirement pay, and had begun to receive disability benefits, before the parties were divorced. See *id.* at 585. The settlement agreement between the parties specifically provided for the division of the former military member's "total military retirement pay, including that portion of retirement pay waived so that [he] could receive disability benefits." *Id.* at 586.

The *Mansell* Court recognized that "domestic relations are preeminently matters of state law," and that Congress "rarely intends to displace state authority in this area." 490 U.S. at 587. The Court concluded, however, that the case before it "present[ed] one of those rare instances where Congress has directly and specifically legislated in the area of domestic rela-

tions." *Ibid.* The Court held that, under the Spouses' Protection Act's "plain and precise language, state courts have been granted the authority to treat *disposable* retired pay as community property," but "have not been granted the authority to treat *total* retired pay as community property." *Id.* at 589 (emphases added). The Court concluded that the Act "does not grant state courts the power to treat as property divisible upon divorce military retirement pay that has been waived to receive veterans' disability benefits." *Id.* at 594-595.

2. a. In 1991, petitioner John Howell and respondent Sandra Howell divorced in Arizona, and the family court entered a decree of dissolution "[p]ursuant to the parties' agreement." Pet. App. 2a. The decree provided for the disposition of the parties' personal property, their cars and associated debts and liens, and their 1990 tax refund. *Id.* at 41a. The decree also ordered petitioner to pay child support of $585 per month, *id.* at 42a, and to pay respondent "as and for spousal maintenance the amount of $150.00 per month until" petitioner's anticipated retirement in October 1992, *id.* at 43a. The decree further provided that "[respondent] is entitled to and is awarded as her sole and separate property FIFTY PERCENT (50%) of [petitioner's] military retirement when it begins through a direct pay order." *Id.* at 41a. The parties agree that, under Arizona law, the family court's entry of the dissolution decree gave respondent a vested property right to her share of military retirement pay. *Id.* at 11a.

In the year after the divorce, petitioner retired from the Air Force, and the parties began to receive military retirement pay. Pet. App. 2a-3a. In 2005,

petitioner qualified for a 20% disability rating based on a service-connected shoulder injury, and he elected to waive a corresponding portion of his military retirement pay to receive disability benefits. *Id.* at 3a. That waiver had the effect of reducing respondent's monthly share of petitioner's retirement pay by approximately $125 per month, while increasing petitioner's monthly pre-tax receipts (from retirement pay and disability benefits combined) by a corresponding amount. *Ibid.*; see *id.* at 33a.

b. Respondent moved to enforce the decree's division of military retirement pay, and the family court granted her motion. Pet. App. 31a-38a. The court found that the divorce agreement had given respondent "a vested interest in fifty percent of the military retirement," and that under Arizona law, petitioner "could not unilaterally divest her interest in the retirement." *Id.* at 35a. The court held that petitioner had "violated the [divorce] decree by unilaterally decreasing the retirement pay in favor of disability," which impinged on respondent's vested property right to 50% of the full military retirement-pay amount. *Id.* at 36a. The Arizona Court of Appeals affirmed. *Id.* at 21a.

c. The Supreme Court of Arizona affirmed the family court's opinion.[2] Pet. App. 1a-14a. The court

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[2] Petitioner did not raise a federal preemption defense in the family court, raising this argument for the first time in the Arizona Court of Appeals. Pet. App. 20a-21a. The court of appeals declined to consider the argument on the ground that it had been waived below. *Ibid.* The Supreme Court of Arizona, however, decided as a matter of discretion to entertain and resolve petitioner's argument that the Spouses' Protection Act preempted the family court's indemnification order. *Id.* at 5a.

determined that the Spouses' Protection Act did not preempt the family court's indemnification order. *Id.* at 7a-8a. The court noted that respondent "was awarded fifty percent of the [military retirement pay] years before [petitioner] unilaterally elected to receive disability pay in lieu of a portion of the [military retirement pay]." *Id.* at 7a. The court concluded that "[n]othing in the [Act] directly prohibits a state court from ordering a veteran who makes a post-decree VA waiver to reimburse the ex-spouse for reducing his or her share of [military retirement pay]." *Id.* at 8a. The court observed that the indemnification order did not "divide the [military retirement pay] subject to the VA waiver, order [petitioner] to rescind the waiver, or direct him to pay any amount to [respondent] from his disability pay." *Id.* at 7a.

The Supreme Court of Arizona also found the family-court order proper as a matter of Arizona state law. Although the parties' 1991 divorce decree did not expressly require indemnification in the circumstances presented here, its effect under Arizona law was to "create[] an immediate right to future pay of fifty percent of the [military retirement pay], including cost-of-living increases, earned during the marriage." Pet. App. 13a. The court explained that, once that right had vested, "[o]ne spouse cannot invoke a condition solely within his or her control to defeat the community interest of the other spouse." *Ibid.* (citing *Koelsch* v. *Koelsch*, 713 P.2d 1234, 1239 (Ariz. 1986) (en banc)).[3] The court found that, "[b]y electing the

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[3] An Arizona statute enacted in 2010 (Ariz. Rev. Stat. Ann. § 25-318.01 (Supp. 2015)) provides that a state court in disposing of marital property may not "[i]ndemnify the veteran's spouse or former spouse for any prejudgment or postjudgment waiver or

VA waiver, [petitioner] did precisely that by essentially converting part of [respondent's military retirement pay] share," and that the family court's indemnification order "restored [respondent's] share of community assets." *Ibid.*

SUMMARY OF ARGUMENT

The original 1991 divorce decree in this case did not divide military retirement pay that had been waived in favor of disability benefits. Petitioner's disability waiver occurred well *after* the divorce decree and division of marital property. See Pet. App. 2a-3a. The family court's 2014 indemnification order likewise did not purport to divide the waived retirement pay as marital property. Rather, the family court applied Arizona's generally applicable contract and property law to hold that respondent's right to the value of disposable retirement pay had vested at the time of divorce, and to indemnify her for the economic loss she had suffered due to petitioner's unilateral, post-settlement action. *Id.* at 12a-13a. The Spouses' Protection Act does not preclude Arizona courts from enforcing those state-law rules.

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reduction in military retired or retainer pay related to the receipt of [veterans'] disability benefits." Pet. App. 9a. Although the Supreme Court of Arizona found that the family-court order in this case "modifies rather than enforces the dissolution decree's property disposition terms," *id.* at 10a, the court declined to apply Section 25-318.01 to bar indemnification because that statute was passed after the original divorce decree in this case. The court concluded that "the family court correctly refused to apply § 25-318.01 to these facts" because "application of § 25-318.01 to prohibit the court from remedying the deprivation would diminish [respondent's] vested property right in violation of the [Arizona constitution's] due process guarantee." *Id.* at 14a.

1. Because this case involves difficult questions of state domestic-relations law, the presumption against preemption applies and limits the preemptive force of the Spouses' Protection Act to its clear and precise terms, or to applications of state law that manifestly conflict with federal policy.

2. The Spouses' Protection Act prevents state courts from dividing waived military retirement pay as marital or community property, but it does not preempt state courts from ordering indemnification if a veteran waives military retirement pay after his divorce has been finalized and that waiver damages the severed property interests of his former spouse. The Act defines "disposable retired pay" to exclude only that portion of military retirement pay that has already been waived in favor of disability benefits at the time of the veteran's divorce, and it expressly authorizes state courts to treat "disposable retired pay" as community property of the veteran and his spouse if state law so dictates.

Similarly, the Act reflects Congress's intent to preserve well-established state-law rules that promote certainty, equity, and finality in divisions of property upon divorce. Indemnification is one such remedy. During divorce proceedings, the court and the parties must typically balance a range of factors (including existing disability waivers) to arrive at an equitable property division or a mutually-agreeable property settlement, and to determine whether additional forms of relief (*e.g.*, alimony or child support) are warranted. Although federal law precludes state courts from treating waived retirement benefits as divisible marital property, it otherwise leaves the state courts free to determine whether and how to

divide a veteran's disposable military retirement pay and other marital property. See 10 U.S.C. 1408(c)(1). Once a divorce is finalized, however, the disposable retired pay is permanently severed. A veteran's subsequent waiver of military retirement pay then impinges on the separate interests of his former spouse. The Act does not prohibit States from giving the former spouse a remedy in such circumstances.

Thus, although an indemnification order and a division of property may have similar *economic* effects on the veteran's financial circumstances, the two are not *legally* equivalent. The practical consequences of pre- and post-divorce waivers also differ substantially. When a veteran has already waived retirement pay at the time a divorce decree is entered, the trial court and the parties can take that waiver (and the consequent reduction in the spouse's share of retirement pay) into account in dividing other property and in determining whether other forms of relief are appropriate. But a post-divorce waiver may disturb the state court's careful equitable balance and the parties' settled expectations. There are consequently good reasons for Congress to preempt state courts from dividing military retirement pay waived prior to divorce, but to permit States to protect former spouses against post-divorce waivers. Congress's failure to override States' widespread recognition of indemnification for post-divorce waivers of military retirement pay further suggests that Congress views such remedies as consistent with federal law and policy.

3. The Spouses' Protection Act is designed to protect the interests of both the veteran and his former spouse. Congress determined that the application of state marital-property principles, with limited and

precisely defined exceptions, best protected those interests. Congress has further protected veterans' disability benefits by exempting them from taxation and insulating them from attachment. This Court has made clear, however, that Congress intended veterans' disability benefits to support not only veterans, but also their families. See *Rose* v. *Rose*, 481 U.S. 619, 630 (1987). An order of indemnification that enforces prior property divisions, to the extent it comports with anti-attachment limitations, does not conflict with those interests.

Allowing state-law indemnification remedies in the circumstances presented here will not create the illogical results suggested by petitioner. The Spouses' Protection Act reflects Congress's recognition that state trial courts are best positioned to determine the appropriate equitable division of military retirement pay in the initial formulation of divorce decrees. The state courts are similarly well-equipped to enforce such orders fairly in light of any changed circumstances following the divorce.

ARGUMENT

THE SPOUSES' PROTECTION ACT ALLOWS STATES TO ORDER INDEMNIFICATION IF A VETERAN'S POST-DIVORCE DISABILITY WAIVER REDUCES HIS FORMER SPOUSE'S SHARE OF PREVIOUSLY DIVIDED MILITARY RETIREMENT PAY

A. The Presumption Against Preemption Requires A Narrow And Limited View Of The Act's Preemptive Force

Federal law preempts conflicting state law. Such a conflict exists when "compliance with both federal and state regulations is impossible" or when state law

"stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hillman* v. *Maretta*, 133 S. Ct. 1943, 1950 (2013) (citation omitted). The "ultimate touchstone" for determining "the scope of a [federal] statute's preemptive effect" is the "purpose of Congress." *Hughes* v. *Talen Energy Mktg., LLC*, 136 S. Ct. 1288, 1297 (2016) (brackets in original) (quoting *Altria Grp., Inc.* v. *Good*, 555 U.S. 70, 76 (2008)).

The presumption against preemption applies to the Spouses' Protection Act and limits its preemptive scope. This Court has long recognized that "[t]he whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States." *In re Burrus*, 136 U.S. 586, 593-594 (1890). State courts have "unparalleled familiarity with local economic factors affecting divorced parents and children," and significant experience applying state statutes containing "detailed support guidelines and established procedures for allocating resources following divorce." *Rose* v. *Rose*, 481 U.S. 619, 628 (1987). The "theory and the precedents" of this Court teach "solicitude for state interests, particularly in the field of family and family-property arrangements," where "[e]ach State has its complex of family and family-property arrangements." *United States* v. *Yazell*, 382 U.S. 341, 352 (1966).

This Court accordingly has applied "a presumption against pre-emption of state laws governing domestic relations," *Hillman*, 133 S. Ct. at 1950 (citation and internal quotation marks omitted), which requires Congress to speak clearly if it intends federal law to displace state law and the traditional role of state

courts in that sphere. See, *e.g.*, *Mansell* v. *Mansell*, 490 U.S. 581, 587 (1989); *Rose*, 481 U.S. at 625, 628. In accordance with that presumption, "[o]n the rare occasion when state family law has come into conflict with a federal statute, [the] Court has limited review under the Supremacy Clause to a determination whether Congress has 'positively required by direct enactment' that state law be pre-empted." *Hisquierdo* v. *Hisquierdo*, 439 U.S. 572, 581 (1979) (citation omitted); see *Mansell*, 490 U.S. at 587. Alternatively, "a state law governing domestic relations" is preempted if it does "major damage to clear and substantial federal interests." *Rose*, 481 U.S. at 625 (citation and internal quotation marks omitted).

Petitioner contends (Br. 36) that the presumption against preemption is inapplicable to the Spouses' Protection Act. In *Mansell*, however, this Court applied the presumption and held the relevant state-court order to be preempted only after finding that the presumption had been overcome by the Act's plain terms. 490 U.S. at 587 (describing the presumption and stating that the case before the Court "present[ed] one of those rare instances where Congress has directly and specifically legislated in the area of domestic relations"). The Court concluded that, "under the Act's plain and precise language, state courts have been granted the authority to treat disposable retired pay as community property; they have not been granted the authority to treat total retired pay as community property." *Id.* at 589. Similarly, the Court in *McCarty* v. *McCarty*, 453 U.S. 210 (1981), did not hold that the strong federal interests in regulating military benefits and veterans' rights eliminated the presumption against preemption of state domestic-

relations law; instead, it found that a clear conflict with federal interests sufficed to overcome the presumption. See *id.* at 220-221, 232.

Petitioner contends (Br. 37) that *Mansell* disavowed the presumption against preemption when it stated that, because *McCarty* construed "pre-existing federal law" to "completely pre-empt[] the application of state community property law to military retirement pay, Congress could overcome the *McCarty* decision only by enacting an affirmative grant of authority giving the States the power to treat military retirement pay as community property." 490 U.S. at 588. As explained below, however, the Court in both *McCarty* and *Mansell* addressed only whether a state court could treat as community property, divisible upon divorce, retirement pay that had *already* been waived. In this case, by contrast, the state courts did not purport to treat waived retirement pay as community property. Rather, the family court imposed, and the state appellate courts approved, an indemnification remedy designed to enforce a division of marital property that predated petitioner's waiver and was indisputably valid at the time it was entered. *Mansell* does not suggest that the presumption against preemption should be disregarded in determining the permissibility of that distinct indemnification remedy.

This case involves delicate state-law questions concerning what remedial measures are available when a divorced veteran takes unilateral action that reduces the value of his former spouse's share of previously divided marital assets. Family courts are best positioned to determine how to fairly allocate marital property and to assess the impact of unanticipated changed circumstances on that distribution. The

purpose behind the presumption against preemption therefore applies fully here. Given Congress's and this Court's solicitude for state interests in the area of domestic relations, any doubt as to whether Congress preempted indemnification orders should be resolved in favor of preserving state authority.

B. Once Disposable Retired Pay Has Been Divided Through A Final Divorce Decree, A State Court May Order Indemnification To Protect The Separate Property Interests Of The Non-Veteran Spouse

The Court in *Mansell* held that the Spouses' Protection Act, read in light of the Court's prior decision in *McCarty*, forecloses state courts from "treat[ing] as property divisible upon divorce military retirement pay that has been waived to receive veterans' disability benefits." 490 U.S. at 595. The Act does not specifically address the authority of state courts to respond to post-divorce waivers. Rather, the Act recognizes that divisible "disposable retired pay" should be measured at the time of divorce. After the divorce decree becomes final, the divided portion of retired pay becomes the parties' separate assets. Under the Act's terms, moreover, the divided interest may be fixed, and need not fluctuate with a veteran's subsequent unilateral decision to elect a disability waiver.

A post-divorce waiver therefore may impinge on the separate property interests of the former spouse. Congress has not preempted state remedies, such as indemnification, that are designed to protect the certainty and finality of divorce decrees. Appellate courts in 33 States have permitted such orders and, despite numerous amendments to the Act, Congress has not overridden those decisions. Congress therefore has not displayed any clear intent to preempt

States from ordering indemnification to account for a post-divorce waiver of military retirement pay.

1. The text and structure of the Spouses' Protection Act support state authority to enforce a valid division of "disposable retired pay" as calculated at the time the divorce became final

The text and structure of the Spouses' Protection Act establish that the measure of divisible "disposable retired pay" is made before the divorce is finalized. The Act defines "disposable retired pay" in the present tense to be the "monthly retired pay to which a member *is entitled* less amounts" which "*are deducted* * * * as a result of a waiver of retired pay [in favor of disability benefits]," 10 U.S.C. 1408(a)(4)(B) (emphases added); see *Carr* v. *United States*, 560 U.S. 438, 448 (2010) (observing that, "[c]onsistent with normal usage," the Court has "frequently looked to Congress' choice of verb tense to ascertain a statute's temporal reach"). Similarly, the Court in *Mansell* noted that "the [Act] does not grant state courts the power to treat as property divisible upon divorce military retirement pay that *has been waived* to receive veterans' disability benefits." 490 U.S. at 594-595 (emphasis added).

A recent amendment to the Act's definition of "disposable retired pay" bolsters the conclusion that its value should be determined at the time of the divorce decree. That amendment instructs courts to value "total monthly retired pay" based on "the member's pay grade and years of service *at the time of the court order*, as increased by" cost-of-living adjustments. National Defense Authorization Act for Fiscal Year 2017 (2017 National Defense Authorization Act), Pub. L. No. 114-328, § 641, 130 Stat. 2163 (emphasis add-

ed).[4] Congress thus clarified that the divisible marital property does not include future increases to a servicemember's retirement pay attributable to post-divorce raises in pay grade or subsequent years of military service. H.R. Rep. No. 840, 114th Cong., 2d Sess. 1056-1057 (2016). By the same token, courts in valuing "disposable retired pay" at the time of divorce are not required, and could not reasonably be expected, to assess the possibility that such pay will decrease due to a veteran's subsequent decision to elect disability benefits.

In addition, the Act defines "court order" to include a divorce decree that, "in the case of a division of property, specifically provides for the payment of an amount, expressed in dollars or as a percentage of disposable retired pay, from the disposable retired pay of a member to the spouse or former spouse of that member." 10 U.S.C. 1408(a)(2)(C). If the family court in the original divorce proceeding had ordered petitioner to pay respondent a specific monthly sum once petitioner began to receive military retirement benefits, the Act could not reasonably be thought to preempt continued enforcement of that directive after petitioner elected to receive disability benefits in lieu of a portion of his retired pay.[5] By instead directing

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[4] That amendment applies prospectively to divorce decrees finalized after the enactment date of the 2017 National Defense Authorization Act. See § 641(b), 130 Stat. 2163.

[5] See, *e.g.*, *In re Marriage of Lodeski*, 107 P.3d 1097, 1100 (Colo. App. 2004) (enforcing division of property awarding wife $436 as her share of husband's military retirement pay "in spite of his [subsequent] unilateral waiver of retirement benefits"); *McHugh* v. *McHugh*, 861 P.2d 113, 115 (Idaho Ct. App. 1993) ("The parties negotiated for and *mutually agreed* to a division of the military retired pay which granted [the former spouse] a specific monthly

petitioner to pay a percentage (50%) of his disposable retired pay, the divorce decree ensured, *inter alia*, that respondent would benefit from subsequent cost-of-living increases in petitioner's retired pay. See Pet. App. 12a-13a. But neither the Spouses' Protection Act's definition of "court order," nor any other provision of the Act, suggests that the Act's preemptive scope should vary dramatically depending on the family court's choice between a percentage and a specific dollar amount in formulating the original divorce decree.

2. The Act permits States to adopt rules and impose remedies designed to prevent divorced veterans from unilaterally reducing the amounts to which their ex-spouses are entitled under the terms of their divorce decrees

In enacting the Spouses' Protection Act, Congress sought to mitigate the inequity of a preemption rule that would deprive the non-military spouse of access to her marital share of military retirement pay. See *Mansell*, 490 U.S. at 593 (explaining that Congress enacted the Act in recognition of "the distressed economic plight of military wives after a divorce"). Congress determined that, subject to the limited exception that waived retirement pay cannot be treated as marital property, application of state marital-property principles would best protect the economic interests of both military spouses and military members. See *id.* at 593-594; see also S. Rep. No. 502, 97th Cong., 2d

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sum. They further agreed that this sum would not be increased or decreased in the future 'for any reason' except by the application of cost-of-living increases. The two supplemental orders issued by the court did not alter this agreed-to division of the asset, but served simply to enforce it.") (footnote omitted).

Sess. 6 (1982) (1982 Senate Report). By authorizing state courts to treat disposable retired pay "in accordance with" state law, 10 U.S.C. 1408(c)(1), Congress "return[ed] to the States the authority to treat military pensions in the same manner as they treat other retirement benefits." 1982 Senate Report 10.[6] Accordingly, the Act preserves state procedures designed to improve certainty, maintain equity, and promote finality in dividing marital property upon divorce.

In the vast majority of States, trial courts are not required to mechanically split marital property 50-50.[7] Rather, the process of equitably dividing property and awarding alimony and child support (or the parties' negotiation of those terms) requires painstaking and delicate balancing of a host of equitable factors.[8] A

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[6] The final House Conference Report incorporated that section of the 1982 Senate Report. H.R. Conf. Rep. No. 749, 97th Cong., 2d Sess. 168 (1982).

[7] States are divided among two property-division systems: equitable division and community property. Equitable division is by far the dominant rule among the States, while only nine States apply community-property principles. Although many States employ a presumption of equal division, the strength of that presumption varies, and most States afford trial courts broad discretion to determine the equitable division of property. See American Law Inst., *Principles of the Law of Family Dissolution: Analysis and Recommendations* § 4:09, at 732 (2002). Only three community-property States—California, Louisiana, and New Mexico—require "equal division" of the marital estate. See *id.* at 22 & n.31.

[8] Commonly used factors in the equitable division of property include the parties' contributions to the marriage, the duration of the marriage, the parties' future financial needs, and the parties' separate property and liabilities. 2 Brett R. Turner, *Equitable Distribution of Property* §§ 8:1-8:33 (3d ed. 2008) (providing

trial court must first value property, then weigh the equitable factors, and finally divide the property or approve the parties' property settlement in the final divorce decree. See 2 Brett R. Turner, *Equitable Distribution of Property* §§ 7:1, 8:1 (3d ed. 2008); see also 3 Arnold H. Rutkin, *Family Law and Practice* §§ 37.05-37.06 (2016) (Rutkin). In this case, for example, the 1991 divorce decree ordered petitioner to pay respondent monthly spousal maintenance only until the date of petitioner's anticipated retirement the following year, at which time respondent would become entitled to 50% of petitioner's military retirement pay. See Pet. App. 41a, 43a. Once the divorce decree finalizes the division of property, it cannot be modified without a compelling justification such as mistake, fraud, or error of law. See Rutkin § 37.06[2][d].

When a veteran is already receiving disability benefits due to a *pre*-divorce waiver of military retirement pay, the trial court and the parties in the divorce proceeding can take that fact into account in determining what *other* terms the divorce decree should contain and how those terms should be enforced. First, a veteran's disability benefits may be utilized, and, in the case of waived military retirement pay, garnished, to pay child support and alimony. See 42 U.S.C. 659(h)(1)(A)(ii)(V); see also *Rose*, 481 U.S. at 633-635. Second, the parties may consider a veteran's disability benefits when negotiating a property settlement.

Although the Spouses' Protection Act bars the treatment of waived retirement pay as divisible *prop-*

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detailed analysis of equitable factors); see also 3 Arnold H. Rutkin, *Family Law and Practice* § 37.06 (2016) (same).

erty, it does not preclude state courts from considering the veteran's *income* due to a disability waiver as one factor in equitably dividing property.[9] 1982 Senate Report 10 (recognizing that "most State courts" consider the parties' income even when dividing marital property) (citing Section 307 of the Uniform Marriage & Divorce Act); see Rutkin § 37.06[1][d][ii] (noting the "general rule" that earning capacity may "be considered a factor in dividing the marital estate, but not as an asset to be divided"). Courts may also consider the parties' health and disability, particularly as it bears on future economic needs. Rutkin § 37.06[1][d]. States therefore have substantial latitude to consider *pre*-divorce waivers of retired pay in crafting a fair and equitable overall settlement.[10]

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[9] The fact that veterans' disability benefits are characterized as income, not property, also provides a coherent explanation for why the Spouses' Protection Act excludes waived retirement pay from the marital estate, yet subjects both waived and non-waived military retirement pay to garnishment for payment of child support or alimony obligations. See *Rose*, 481 U.S. at 630 (observing that disability benefits are "compensat[ion] for impaired earning capacity"). By contrast, this Court has treated military retirement pay as a form of "deferred compensation," which is a type of property. *Barker* v. *Kansas*, 503 U.S. 594, 599 (1992); see *id.* at 603 (noting that, if the Court had characterized military retirement pay as "current income," the *McCarty* decision "would have been simple" because income is not subject to community-property division).

[10] See, *e.g.*, *Clauson* v. *Clauson*, 831 P.2d 1257, 1263-1264 (Alaska 1992) ("We are aware of no federal statute which specifically prohibits a trial court from taking into account veterans' disability benefits when making an equitable allocation of property," provided the trial court does not "simply shift an amount of property equivalent to the waived retirement pay" from the veteran to the spouse.); *In re Marriage of Kraft*, 832 P.2d 871, 875 (Wash. 1992) (en banc) (noting that, following *Mansell*, the "general rule de-

The entry of a final divorce decree, however, marks a critical change in the ownership of marital property, which is converted into separate property of the parties. A veteran's election to waive retirement pay *after* the divorce is finalized may disrupt the careful balance struck by the trial court in its original decree or upset the parties' settled understanding in a negotiated settlement. Precluding state courts from ordering indemnification in circumstances like these therefore would intrude much more substantially on the States' authority over domestic relations than does the narrow rule announced in *Mansell* that States may not treat waived retirement pay as marital property.[11]

Petitioner is therefore wrong in suggesting (Br. 27-29) that the Supreme Court of Arizona's decision in

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rived" by state courts was that "the court may regard military disability retirement pay as future income to the retiree spouse and * * * consider it as an economic circumstance of the parties," but it "may not * * * divide or distribute the military disability retirement pay as an asset").

[11] See, *e.g.*, *Shelton* v. *Shelton*, 78 P.3d 507, 509 (Nev. 2003) ("Although states cannot divide disability payments as community property, states are not preempted * * * from enforcing contracts [that divide retirement benefits] * * *, even when disability pay is involved."), cert. denied, 541 U.S. 960 (2004); *Resare* v. *Resare*, 908 A.2d 1006, 1010 (R.I. 2006) ("[T]he Family Court did not in any way divide [the veteran's] *disability* benefit in contravention of *Mansell*, but simply held [the veteran] to the terms of the original [property settlement agreement]."); *Johnson* v. *Johnson*, 37 S.W.3d 892, 897-898 (Tenn. 2001) ("[W]hen a[] [marital dissolution agreement] divides military retirement benefits, the non-military spouse has a vested interest in his or her portion of those benefits as of the date of the court's decree. * * * [A]n act of the military spouse [that unilaterally diminishes the vested interest] * * * constitutes an impermissible modification of a division of marital property.").

this case elevates form over substance. Neither *McCarty*, *Mansell*, nor the Spouses' Protection Act specifically addresses the propriety of state-court indemnification orders; rather, all three address only the circumstances under which military retirement pay can be divided as property. In light of the States' traditional authority over domestic relations, and the practical consequences that petitioner's proposed rule would entail, the Act's preemptive force should not be extended beyond what its text requires.

3. Congress's failure to override States' widespread approval of indemnification as a means to remedy a post-divorce disability waiver suggests that Congress viewed that approach as consistent with federal law and policy

The vast majority of States that have considered similar questions—including the highest courts of 12 States and intermediate courts in another 21 States—have concluded that, if a veteran waives military retirement pay after marital property has been divided pursuant to a final divorce decree, the ex-spouse may be entitled to monetary relief if the waiver impinges on her vested or contractual rights. See App., *infra*, 1a-5a (listing cases by State). Courts in at least six of those States, including the Supreme Court of Arizona below, have relied on a "vested rights" theory under which one divorcing spouse is precluded from taking unilateral action that would dissipate, convert, or defeat property rights assigned to the other spouse. *Ibid.*[12] Despite numerous amendments to the Spouses'

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[12] While two state supreme courts (Alabama and Vermont) and two intermediate appellate courts (in Kansas and Kentucky) have rejected relief under the circumstances of the cases before them,

Protection Act and other military family-law statutes (see Pet. Br. 40-43), however, Congress has not explicitly precluded state courts from ordering indemnification under circumstances like those presented here.

Congressional silence in the face of state regulation is "powerful evidence" that Congress did not intend to preempt state law. *Wyeth* v. *Levine*, 555 U.S. 555, 575 (2009). "The case for federal pre-emption is particularly weak where Congress has indicated its awareness of the operation of state law in a field of federal interest, and has nonetheless decided to stand by both concepts and to tolerate whatever tension there [is] between them." *Bonito Boats, Inc.* v. *Thunder Craft Boats, Inc.*, 489 U.S. 141, 166-167 (1989) (brackets in original; citation and internal quotation marks omitted); see *POM Wonderful LLC* v. *Coca-Cola Co.*, 134 S. Ct. 2228, 2237 (2014); *CTS Corp.* v. *Waldburger*, 134 S. Ct. 2175, 2188 (2014).

Congress has amended the Spouses' Protection Act several times since its enactment in 1982, most recently on December 23, 2016.[13] As petitioner observes,

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none of those courts has ruled out the possibility that an express indemnification provision would be enforceable. See App., *infra*, 4a. Only one intermediate state court—the Texas Court of Appeals—has rejected an express indemnification provision, *Limbaugh* v. *Limbaugh*, 71 S.W.3d 1, 17 (2002), and only the Supreme Court of Mississippi and an intermediate appellate court in Ohio have explicitly rejected the "vested rights" rationale for post-waiver indemnification that the courts below invoked in this case, see *Mallard* v. *Burkart*, 95 So. 3d 1264, 1272 (Miss. 2012); *Konieczny* v. *Konieczny*, No. 97-CA-83, 1998 WL 401835, at *2 (Ohio Ct. App. Mar. 27, 1998).

[13] See 2017 National Defense Authorization Act, § 641, 130 Stat. 2163; National Defense Authorization Act for Fiscal Year 2006, Pub. L. No. 109-163, § 665, 119 Stat. 3317-3318; National Defense

Congress "has devoted scrupulous attention to family-law issues surrounding military benefits, constantly tinkering with the governing statutes." Br. 40. Indeed, when the House Committee was "concerned because some state courts ha[d] been less than faithful in their adherence to the spirit of the law" by reopening divorce cases finalized before *McCarty*, Congress directly addressed the problem by amending the statute. H.R. Rep. No. 665, 101st Cong., 2d Sess. 279 (1990); see National Defense Authorization Act for Fiscal Year 1991, Pub. L. No. 101-510, § 555, 104 Stat. 1569. Given Congress's close attention to the interplay between state and federal law in this area, its failure to override the numerous state-court decisions ordering indemnification in these circumstances sug-

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Authorization Act for Fiscal Year 1997, Pub. L. No. 104-201, § 636, 110 Stat. 2579; Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, § 362(c), 110 Stat. 2246-2247; National Defense Authorization Act for Fiscal Year 1994, Pub. L. No. 103-160, § 555, 107 Stat. 1666-1667.

Congress has also made numerous technical changes. See National Defense Authorization Act for Fiscal Year 2010, Pub. L. No. 111-84, § 1073, 123 Stat. 2472-2473; Servicemembers Civil Relief Act, Pub. L. No. 108-189, § 2(c), 117 Stat. 2865-2866; Homeland Security Act of 2002, Pub. L. No. 107-296, § 1704(b), 116 Stat. 2314; National Defense Authorization Act for Fiscal Year 2002, Pub. L. No. 107-107, § 1048(c), 115 Stat. 1226; National Defense Authorization Act for Fiscal Year 1998, Pub. L. No. 105-85, § 1073, 111 Stat. 1900-1901; National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, § 1501(c), 110 Stat. 498-499; National Defense Authorization Act for Fiscal Years 1992 and 1993, Pub. L. No. 102-190, § 1061(a), 105 Stat. 1472; National Defense Authorization Act for Fiscal Years 1990 and 1991, Pub. L. No. 101-189, §§ 653(a), 1622(e), 103 Stat. 1461-1462, 1604-1605; Defense Technical Corrections Act of 1987, Pub. L. No. 100-26, § 7(h), 101 Stat. 282.

gests that Congress did not intend such remedies to be preempted by federal law.

C. Indemnification Orders Do Not Conflict With The Spouses' Protection Act's Purpose And Objectives—Including Its Treatment Of Veterans' Disability Benefits—And Therefore Are Not Impliedly Preempted By The Act

Indemnification to enforce a former spouse's property right arising out of a final division of property or contractual settlement agreement is consistent with the purposes and objectives of the Spouses' Protection Act. Although federal law is highly protective of veterans' military retirement pay and disability benefits, Congress has not chosen to protect veterans' interests to the exclusion of all other objectives, but rather has sought to achieve an appropriate balance between the interests of veterans and the interests of their former spouses. Use of indemnification to protect the expectations created by valid divorce decrees is consistent with that balance.

1. Congress's carefully delineated protections of veterans' disability benefits do not implicitly preempt indemnification orders not expressly barred by federal law

Congress has long displayed special concern for the needs of disabled servicemembers and veterans, and has enacted carefully delineated provisions to protect their interests. *Inter alia*, federal law exempts veterans' disability benefits from taxation, 38 U.S.C. 5301; prohibits creditors from attaching those benefits, see 38 U.S.C. 5301(a)(1); and preempts any state-law rule that would treat waived military retirement pay as divisible property, 10 U.S.C. 1408(a)(4) and (c)(1).

Congress has also been cognizant, however, of the interests of divorced veterans' ex-spouses. Congress enacted the Spouses' Protection Act, in direct response to *McCarty*, to alleviate "the distressed economic plight of military wives after a divorce," while also "protecting the interests of military members." *Mansell*, 490 U.S. at 593-594; see *id.* at 587; see also H.R. Conf. Rep. No. 749, 97th Cong., 2d Sess. 165 (1982); 1982 Senate Report 1-3, 16.

In light of its purpose to protect the interests of both parties, the Spouses' Protection Act's exclusion of waived military pay from the marital estate should not be taken to signify a broader congressional intent that "disabled veterans keep all of their disability pay." Pet. Br. 19; see *id.* at 20. To the contrary, this Court has recognized that military disability benefits "are not provided to support [the veteran] alone," but rather, that "Congress clearly intended veterans' disability benefits to be used, in part, for the support of veterans' dependents." *Rose*, 481 U.S. at 630-631.[14] Indeed, although disability benefits received in lieu of waived retirement pay may not be treated as divisible property, those benefits may be used, for example, "to 'provide reasonable and adequate compensation for veterans *and their families*'" through court-ordered child support or alimony. *Id.* at 630 (citation omitted);

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[14] *Rose* involved a Tennessee court order under which a disabled veteran was required to support his children from a former marriage. 481 U.S. at 622. The Court concluded that the anti-attachment provision in former 38 U.S.C. 3101(a) (1988) (recodified at 38 U.S.C. 5301(a)(1)) did not foreclose the state court from holding the veteran in contempt for failure to comply with the support order, even though the veteran's limited income would require him to use his disability benefits to pay fully the ordered support. 481 U.S. at 630-633.

see 42 U.S.C. 659(h)(1)(A)(ii)(V) (subjecting disability pay received in lieu of waived retirement pay to garnishment for child-support and alimony obligations). That nuanced scheme suggests that Congress did not intend to implicitly preempt a broader swath of state domestic-relations law. Cf. *Cipollone* v. *Liggett Grp., Inc.*, 505 U.S. 504, 517 (1992) ("Congress' enactment of a provision defining the pre-emptive reach of a statute implies that matters beyond that reach are not pre-empted.").[15]

This Court in *Rose* further distinguished veterans' disability benefits from the benefit schemes that were at issue in cases cited by petitioner (Br. 20-22)—*Ridgway* v. *Ridgway*, 454 U.S. 46 (1981), *Hisquierdo*, 439 U.S. 572, and *Wissner* v. *Wissner*, 338 U.S. 655 (1950). In those cases, this Court held that state domestic-relations law was preempted by anti-attachment provisions similar to Section 5301(a)(1). *Rose*, 481 U.S. at 633; see *id.* at 631-632. In each of those cases, federal law either made the retiree "the exclusive beneficiary" of federal benefits, see *Ridgway*, 454 U.S. at 55-60; *Hisquierdo*, 439 U.S. at 583; or gave the retiree "an express right to designate the beneficiary" of a federal insurance policy, see *Wissner*, 338 U.S. at 658-659. See also *Rose*, 481 U.S. at 631-633. This Court held that the operation of state community-property principles, which required dividing those benefits with the retiree's ex-spouse, conflicted with "Congress' precise specification of the intended beneficiary" (in *Hisquierdo*), *id.* at 632; or

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[15] But cf. *Geier* v. *American Honda Motor Co.*, 529 U.S. 861, 869 (2000) (observing that Congress's inclusion of an express pre-emption clause "does *not* bar the ordinary working of conflict pre-emption principles").

frustrated "Congress' unequivocal intent that the insured decide who should receive the [insurance] policy proceeds" (in *Wissner* and *Ridgway*), *id.* at 631, 633-634. With respect to veterans' disability benefits, by contrast, "Congress has not made [the veteran] the exclusive beneficiary," *id.* at 634, but rather has intended those benefits to provide income to support both the veteran and his family, *id.* at 630. The Court in *Rose* distinguished *Wissner*, *Hisquierdo*, and *Ridgway* on that basis.[16]

Congress thus has carefully fashioned the protections afforded to veterans' disability benefits, and has made clear that those benefits are intended in part to support the veteran's family. With respect to the veteran's support obligations to his children and for-

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[16] Veterans' disability benefits are therefore distinguishable from federal benefits that are expressly designed to be supplemental to the beneficiary's other income sources. In *Rose* v. *Arkansas State Police*, 479 U.S. 1 (1986) (per curiam), for example, this Court held that the federal scheme benefitting families of deceased law-enforcement officers, 42 U.S.C. 3796(e) (1982), preempted a state statute that diminished benefits available under state law by one dollar for every dollar of federal benefits that the families received. 479 U.S. at 3-4. This Court explained that "Congress plainly intended to give supplemental benefits to the survivors," and that States therefore could not reduce the benefits "it otherwise would provide to account for the federal payment." *Id.* at 4; see also *Hendrick* v. *New Hampshire Dep't of Health & Human Servs.*, 145 A.3d 1055 (N.H. 2016) (contrasting federal Social Security Disability Income, which is treated as a substitute for income to the beneficiary, with Supplemental Security Income, which is designed to supplement other benefits and is limited to the "use and benefit" of only the beneficiary). Unlike those federal schemes designed to supplement the beneficiary's other income and benefits, veterans' disability benefits are not protected from offsets that fulfill the veteran's obligations to his former spouse.

mer spouse, Congress has chosen to treat disability benefits received in lieu of military retirement pay like a veteran's other income, and has not shielded them from enforceable support orders. And while the anti-attachment statute, 38 U.S.C. 5301, may prevent direct attachment of a veteran's disability benefits, see Part D, *infra*, Congress has not otherwise limited state courts from ordering indemnification based on a waiver of military retirement pay if the veteran has other sources of income or property that may be used to satisfy the court order.

2. Allowing indemnification orders in circumstances like these will not lead to anomalous outcomes

The approach taken by the Arizona courts in this case, under which petitioner was ordered to indemnify respondent for the economic loss she suffered as a result of petitioner's post-divorce waiver of military retirement pay, does not create the stark economic discrepancy between pre- and post-divorce waivers that petitioner's hypotheticals suggest (see Br. 32-33, 47-49). When a veteran has waived retirement pay in favor of disability benefits *before* a divorce decree is entered, state courts and the divorcing spouses can take that fact into account in determining the appropriate division of other property and the propriety of awarding alimony and/or child support, at least so long as the marital estate includes assets beyond the veteran's disability pay. See Part B.2, *supra*.

Reading the Spouses' Protection Act to *permit* indemnification awards in these circumstances would not *require* any state court to award such relief, nor would it prevent courts from considering the full range of relevant equitable factors if a veteran's spouse engaged in the sort of gamesmanship that

petitioner hypothesizes (Br. 32-35). For example, nothing in the Act precludes adjustments to an equitable property division or support award if one party accelerates divorce proceedings in order to obtain a right to military retirement pay before a veteran can finalize his eligibility for disability benefits. Cf. *id.* at 32. States likewise may account for a veteran's waiver of military retirement pay intended to undermine the property interests of the non-veteran spouse in close proximity to or in contemplation of divorce. See *id.* at 35. Similarly, petitioner's conjecture that allowing indemnification would treat shorter-serving military members more favorably than those with lengthy service (see *id.* at 47-49) ignores a trial court's latitude to take account of disability benefits in initially dividing property and awarding alimony.

Petitioner's hypotheticals also ignore the unfairness of allowing one spouse to unilaterally undermine the careful balance that the family court reached when dividing marital assets. Adoption of the broad preemption rule that petitioner advocates could have other deleterious consequences as well. If a state court administering a divorce proceeding knew that a veteran could unilaterally reduce the amounts payable to his ex-spouse after the decree became final, the court might try to protect the non-veteran spouse by awarding her an increased share of other marital assets. That approach could produce unfairness to the veteran, particularly in cases where no post-divorce waiver of retirement pay ultimately occurs.

D. The Indemnification Order At Issue In This Case Does Not Implicate The Anti-Attachment Provision Applicable To Veterans' Disability Benefits

Under 38 U.S.C. 5301(a)(1) (formerly 38 U.S.C. 3101(a) (1988)), veterans' disability benefits are non-assignable, are exempt from the claims of creditors, and are not liable to attachment, levy, or seizure. Even if this Court affirms the Supreme Court of Arizona's holding with respect to the Spouses' Protection Act, Section 5301(a)(1) may sometimes impose practical impediments to the enforcement of indemnification orders like the one at issue here.[17]

In this case, however, petitioner has not argued that the Supreme Court of Arizona's decision was inconsistent with Section 5301(a)(1), and there is no indication that the money petitioner was ordered to pay would come out of his disability benefits. The family court did not "direct [petitioner] to pay any amount to [respondent] from his disability pay." Pet. App. 7a. And while "requiring [petitioner] to reimburse [respondent] diminishes the overall income increase he received when he elected the VA waiver," *id.* at 7a-8a, petitioner was still receiving approximately $610 per month in disposable retired pay and was ordered to pay respondent only an additional $127.50 per month (adjusted for cost of living), *id.* at

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[17] The veteran in *Mansell* argued that the state court's division of his total retired pay violated not only the Spouses' Protection Act, but also the statutory predecessor to Section 5301(a)(1). In light of its holding that the Spouses' Protection Act precludes the division as marital property of retirement pay waived in favor of disability benefits, the Court in *Mansell* found it unnecessary to address whether the anti-attachment provision would independently preclude such a division. See 490 U.S. at 587 n.6.

3a. See Pet. Br. 24 (acknowledging that the Arizona decree "did not directly interfere with [p]etitioner's receipt of his disability pay"). Section 5301(a)(1) therefore is not implicated in this case.

CONCLUSION

The judgment of the Supreme Court of Arizona should be affirmed.

Respectfully submitted.

NOEL J. FRANCISCO
Acting Solicitor General
CHAD A. READLER
Acting Assistant Attorney General
MALCOLM L. STEWART
Deputy Solicitor General
ILANA H. EISENSTEIN
Assistant to the Solicitor General
ALISA B. KLEIN
KATHERINE TWOMEY ALLEN
Attorneys

FEBRUARY 2017

APPENDIX

STATE APPELLATE COURT DECISIONS ON AUTHORITY TO INDEMNIFY THE FORMER SPOUSE AFTER A VETERAN'S POST-DIVORCE WAIVER OF RETIREMENT PAY

Approving Indemnification

On Vested Property Rights Theory

1. **Arizona:** *In re Marriage of Howell*, 361 P.3d 936, 941 (Ariz. 2015), cert. granted *sub nom. Howell* v. *Howell*, 137 S. Ct. 546 (2016).

2. **California:** *Cassinelli* v. *Cassinelli*, 210 Cal. Rptr. 3d 311, 320 (Cal. Ct. App. 2016), review denied (Cal. Jan. 18, 2017).

3. **Illinois:** *In re Marriage of Nielsen & Magrini*, 792 N.E.2d 844, 849 (Ill. App. Ct. 2003).

4. **Indiana:** *Bandini* v. *Bandini*, 935 N.E.2d 253, 263 (Ind. Ct. App. 2010).

5. **New Jersey:** *Whitfield* v. *Whitfield*, 862 A.2d 1187, 1191 (N.J. Super. Ct. App. Div. 2004).

6. **Tennessee:** *Johnson* v. *Johnson*, 37 S.W.3d 892, 897-898 (Tenn. 2001).

On Contract Theory

7. **Alaska:** *Glover* v. *Ranney*, 314 P.3d 535, 543 (Alaska 2013).

8. **Colorado:** *In re Marriage of Lodeski*, 107 P.3d 1097, 1100 (Colo. App. 2004).

9. **Florida:** *Abernethy* v. *Fishkin*, 699 So. 2d 235, 240 (Fla. 1997).

10. **Hawaii:** *Perez* v. *Perez*, 110 P.3d 409, 414 (Haw. Ct. App. 2005).

11. **Idaho:** *McHugh* v. *McHugh*, 861 P.2d 113, 115 (Idaho Ct. App. 1993).

12. **Iowa:** *In re Marriage of Gahagen*, 690 N.W.2d 695, 2004 WL 1813601, at *5 (Iowa Ct. App. 2004) (Tbl.).

13. **Louisiana:** *Ast* v. *Ast*, 162 So. 3d 720, 723, 725 (La. Ct. App.), writ denied, 171 So. 3d 952 (La. 2015).*

14. **Maine:** *Black* v. *Black*, 842 A.2d 1280, 1284-1285 (Me. 2004).

15. **Maryland:** *Dexter* v. *Dexter*, 661 A.2d 171, 174-175 (Md. Ct. Spec. App.), cert. denied, 668 A.2d 36 (Md. 1995) (Tbl.).

16. **Massachusetts:** *Krapf* v. *Krapf*, 786 N.E.2d 318, 326 (Mass. 2003).

17. **Michigan:** *Megee* v. *Carmine*, 802 N.W.2d 669, 682 (Mich. Ct. App. 2010).

18. **Minnesota:** *Gatfield* v. *Gatfield*, 682 N.W.2d 632, 636 (Minn. Ct. App.), review denied (Minn. Sept. 29, 2004).

19. **Missouri:** *Strassner* v. *Strassner*, 895 S.W.2d 614, 618 (Mo. Ct. App. 1995).

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* Cf. *Brouillette* v. *Brouillette*, 51 So. 3d 898, 901 (La. Ct. App. 2010) (declining to order indemnification after veteran's post-divorce waiver of military retirement pay because Louisiana law gives the veteran "sole interest" in military disability benefits).

20. **Nevada:** *Shelton* v. *Shelton*, 78 P.3d 507, 509 (Nev. 2003), cert. denied, 541 U.S. 960 (2004).

21. **New Mexico:** *Hadrych* v. *Hadrych*, 149 P.3d 593, 596 (N.M. Ct. App. 2006), cert. denied, 152 P.3d 150 (N.M. 2007) (Tbl.).

22. **New York:** *Hoskins* v. *Skojec*, 696 N.Y.S.2d 303, 305 (N.Y. App. Div. 1999), leave to appeal denied, 726 N.E.2d 482 (N.Y. 2000).

23. **North Carolina:** *Hillard* v. *Hillard*, 733 S.E.2d 176, 180-181 (N.C. Ct. App. 2012), review denied, 736 S.E.2d 490 (N.C. 2013).

24. **Oklahoma:** *Hayes* v. *Hayes*, 164 P.3d 1128, 1131-1132 (Okla. Civ. App.), cert. denied (Okla. June 4, 2007).

25. **Oregon:** *In re Marriage of Hayes*, 208 P.3d 1046, 1053 (Or. Ct. App. 2009).

26. **Pennsylvania:** *Hayward* v. *Hayward*, 868 A.2d 554, 560-561 (Pa. Super. Ct. 2005).

27. **Rhode Island:** *Resare* v. *Resare*, 908 A.2d 1006, 1010 (R.I. 2006).

28. **South Carolina:** *Price* v. *Price*, 480 S.E.2d 92, 93 (S.C. Ct. App. 1996).

29. **South Dakota:** *Hisgen* v. *Hisgen*, 554 N.W.2d 494, 498 (S.D. 1996).

30. **Virginia:** *Owen* v. *Owen*, 419 S.E.2d 267, 270 (Va. Ct. App. 1992).

Permitting Post-Divorce Waiver To Be Considered In Revising Alimony Award

31. **Arkansas:** *Ashley* v. *Ashley*, 990 S.W.2d 507, 509 (Ark. 1999).

32. **Nebraska:** *Kramer* v. *Kramer*, 567 N.W.2d 100, 113 (Neb. 1997).

33. **Washington:** *In re Marriage of Jennings*, 980 P.2d 1248, 1255-1256 (Wash. 1999) (en banc).

No Relief Under The Particular Circumstances
(But Not Reaching Express Indemnification Issue)

1. **Alabama:** *Ex parte Billeck*, 777 So. 2d 105, 109 (Ala. 2000).

2. **Kansas:** *In re Marriage of Pierce*, 982 P.2d 995, 998 (Kan. Ct. App.), review denied (Kan. Nov. 9, 1999).

3. **Kentucky:** *Copas* v. *Copas*, 359 S.W.3d 471, 479 (Ky. Ct. App. 2012). But see *Wilson* v. *Wilson*, No. 2004-CA-276, 2005 WL 2398020, at *3 (Ky. Ct. App. Sept. 30, 2005) (unpublished) (enforcing an indemnification provision after post-divorce waiver), review denied (Ky. Aug. 17, 2006).

4. **Vermont:** *Youngbluth* v. *Youngbluth*, 6 A.3d 677, 690-691 (Vt. 2010).

Indemnification Not Permitted

1. **Mississippi:** *Mallard* v. *Burkart*, 95 So. 3d 1264, 1272 (Miss. 2012).

2. **Ohio:** *Konieczny* v. *Konieczny*, No. 97-CA-83, 1998 WL 401835, at *2 (Ohio Ct. App. Mar. 27, 1998) (finding reimbursement for post-divorce waiver of retirement pay would violate federal law). But see *Blissit* v. *Blissit*, 702 N.E.2d 945, 948 (Ohio Ct. App. 1997) (enforcing "separate provision" of negotiated property settlement where husband agreed to pay wife "the difference" between the gross and disability military retirement pay).

3. **Texas:** *Limbaugh* v. *Limbaugh*, 71 S.W.3d 1, 17 (Tex. App. 2002).

No Decision On Point

1. Connecticut
2. Delaware
3. Georgia
4. Montana
5. New Hampshire
6. North Dakota
7. Utah
8. West Virginia
9. Wisconsin
10. Wyoming

AND BRIEFS.

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JOHN HOWELL,

Petitioner,

—v—

SANDRA HOWELL,

Respondent.

On Writ of Certiorari to the
Supreme Court of Arizona

AMICUS CURIAE BRIEF OF VETERANS OF FOREIGN WARS AND OPERATION FIRING FOR EFFECT IN SUPPORT OF PETITIONER

CARSON J. TUCKER
COUNSEL FOR AMICUS CURIAE
LAW OFFICES OF CARSON J. TUCKER
117 N. FIRST STREET, SUITE 111
ANN ARBOR, MI 48104
(734) 629-5870
CJTUCKER@LEXFORI.ORG

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INTEREST OF AMICUS CURIAE[1]

Amicus curiae, Veterans of Foreign Wars (VFW), is a non-profit veterans service organization under 26 U.S.C. § 501(c)(19), which is comprised of eligible veterans and military service members from the active, guard and reserve forces. Part of VFW's mission is to serve our veterans, the military and our communities, and to advocate on behalf of all veterans. VFW seeks to ensure that veterans are respected for their service, always receive their earned entitlements, and recognized for the sacrifices they and their loved ones have made on behalf of the United States. VFW traces its roots back to 1899 and its membership today stands at nearly 1.7 million.

Amicus curiae, Operation Firing for Effect, Inc. (OFFE), is also a non-profit veterans' service and advocacy organization under § 501(c)(19). OFFE is dedicated to the improvement and protection of the benefits, entitlements, and services earned by our men and women for their voluntary service defending our nation. OFFE is not congressionally chartered and its allegiance is to veterans first. It is OFFE's belief that "Veterans' Affairs" is not a "special interest", but rather a legal, moral, and ethical obligation of the nation.

Congress provides veterans with multiple benefits and entitlements by enacting legislation

---

[1] No counsel for a party authored this brief in whole or in part and no such counsel or party made a monetary contribution intended to fund the preparation or submission of the brief.

pursuant to its "Military Powers" under Article I, § 8, clauses 11 through 13 of the United States Constitution. These enumerated powers are supported by the Necessary and Proper Clause, § 8, cl. 16. These powers are further protected from state infringement by the Supremacy Clause, Article VI, cl. 2, which expressly declares the laws of Congress enacted pursuant to its Military Powers "shall be the supreme Law of the Land and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

Congress provides veterans benefits for the maintenance, readiness, support and care of the nation's military servicemembers, for the common defense and protection of the nation's citizens. The type of veterans' benefits at issue in this case (retirement and disability pay) have been authorized since the dawn of this nation's independence.[2] This Court has, over the course of nearly a century, confirmed that such benefits are an exercise of Congress' exclusive Article I, § 8 Military Powers and have held, accordingly, that state courts are preempted from exercising authority or control over these benefits to the detriment of veterans. Since the Arizona Supreme Court in the case sub judice

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[2] Rombauer, *Marital Status and Eligibility for Federal Statutory Income Benefits: A Historical Survey*, 52 WASH. L. REV. 227, 228 (1977) ("[o]ne of the early resolutions of the first Congress in 1776 provided for monthly payments of up to half pay to officers, soldiers, and seaman disabled in the line of duty" and "in 1789 one of the early acts of the Congress under the new Constitution provided continuance of these payments to the disabled veterans of the Revolutionary Army.") *See also* Waterstone, *Returning Veterans and Disability Law*, 85:3 NOTRE DAME L. REV. 1081, 1084 (2010).

violated this principle, amici respectfully submit this brief in support of Petitioner to urge reversal.

SUMMARY OF ARGUMENT

The Arizona Supreme Court ruled the Uniform Services Former Spouses Protection Act (USFSPA), 10 U.S.C. § 1408, does not prohibit its state courts from considering "non-disposable" veterans' benefits when dividing "marital property" in a divorce proceeding, where the veteran, post-divorce, waives his or her "disposable" retired pay to receive such non-disposable pay. Despite the plain language of the USFSPA prohibiting any consideration of "non-disposable pay" in such proceedings, Arizona is among those states that assert authority over these funds and provide equitable relief to the non-military spouse by allowing post-divorce redistributions that consider or otherwise treat these benefits as divisible assets.

Amici challenge this ruling by asserting that all veterans' benefits that are not "disposable retired pay", as defined by 10 U.S.C. § 1408(a)(4)(B) and (c)(1), are federally protected benefits. Thus, amici assert all state court orders that consider, treat, attach, redistribute, or otherwise cause such benefits to be paid over in marital property distributions (whether pre- or post-divorce) are pre-empted by federal law, void ab initio, and of no force and effect.

In this latter regard, amici also contend, as a jurisdictional limitation, the plain language of 38 U.S.C. § 5301 prohibits state courts from exercising

authority over these benefits in the division of marital property. These benefits are authorized by the Secretary of Veterans Affairs for the exclusive use and benefit of veterans.

Federal law preempts all state authority over veterans' benefits except with respect to a small portion of "disposable" benefits that Congress authorized in the USFSPA, 10 U.S.C. § 1408(a)(4)(B) and (c)(1). Since this definition excludes veterans' retired pay waived to receive disability benefits, and disability benefits themselves, including the disability benefits in this case and the CRSC benefits at issue in *Merrill v. Merrill*, Case No. 15-1139, such other benefits are not "disposable" retired pay.[3] Therefore, such benefits can never be subjected to division, distribution, or re-distribution in a marital property settlement.

This Court's pre-USFSPA jurisprudence, principally *McCarty v. McCarty*, 453 U.S. 210 (1981), continues to prohibit any consideration of such pay by state courts in the division of marital property. In other words, despite broad misstatements to the contrary, state courts never had pre-existing authority, equitable or otherwise, to divide veterans' benefits as marital property. Such ostensible authority asserted by state courts before the *McCarty* decision was simply ultra vires. *Mansell v. Mansell*, 490 U.S. 581, 588-92 (1989)

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[3] *See* 10 U.S.C. § 1413a(g) (by statute "[CRSC payments . . . are not retirement pay"). If they are "not retirement pay", they can never be subjected to division in marital property awards by state courts because it would contravene the plain language of the USFSPA, which allows division of only "disposable" retired pay.)

(rejecting the argument that the USFSPA erased pre-USFSPA federal pre-emption with respect to veterans' benefits).

After *McCarty*, Congress only recognized a limited exception to the absolute federal preemption in the USFSPA, 10 U.S.C. § 1408. The USFSPA allowed state courts to treat only a portion of veterans' benefits (disposable military retirement pay) as property subject to division under the respective states' pre-existing community or equitable property laws. 10 U.S.C. § 1408(c)(1). All other military benefits (*i.e.*, non-disposable retirement benefits (defined in 10 U.S.C. § 1408(a)(4)(B) and (c)(1)), disability benefits, and special compensation incident to military service) remain federally protected veterans' benefits. With respect to the latter, state courts are simply "without power to treat [such benefits] as property divisible upon divorce." *Mansell v. Mansell*, *supra* at 588-89.

In *Mansell*, after nearly a decade of post-USFSPA jurisprudence from state courts, this Court ruled the plain language of the USFSPA prohibited state courts from either directly or indirectly dividing anything other than disposable retired pay, as explicitly defined in sections 1408(a)(4)(B) and (c)(1).

Mansell also confirmed that the USFSPA did nothing to remove *McCarty's* explicit prohibition that state court orders forcing veterans to use non-disposable funds to "make up" or otherwise "offset" the waived disposable pay is contrary to federal law, void to the extent it purports to exercise authority over these funds, and therefore perpetually unsustainable. *See McCarty*, *supra* at 229, n. 23 (emphasis added), quoting *Buchanan v. Alexander*, 45 U.S. 20 (1846)

(stating "[t]he funds of the government are specifically appropriated to certain national objects, and if such appropriations may be diverted and defeated by state process or otherwise, the functions of the government may be suspended"). *See also* 38 U.S.C. § 5301.

Since this Court's decision in *Mansell*, many state courts have strayed far from its clear directive. Indeed, some courts have blatantly ruled the opposite is the case. Some have even had the audacity to admit to adopting Justice O'Connor's dissent, rather than follow this Court's jurisprudence.[4]

This brief provides an historical examination of the legal principles requiring a reversal of the Arizona Supreme Court's decision. Amici demonstrate that rather than abrogate *McCarty*, *supra*, the USFSPA reaffirmed federal preemption with respect to distribution of federal military benefits in marital property distributions consequent to divorce. Prior state court decisions from the mid-1960's up until the 1981 decision in *McCarty* that ruled otherwise were simply acting ultra vires of their authority vis-à-vis the Supremacy Clause by ignoring Congress' express Article I powers as expressed in veterans' benefits legislation from 1789 forward.[5]

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[4] See, *e.g.*, *Nelson v. Nelson*, 83 P.3d 889, 891-92 (Okla. App. 2003) (stating "courts of several states have agreed with Justice O'Connor's position and have taken equitable action to protect former spouses faced with a reduction in payments due to a reduction in military retirement pay" and stating Oklahoma courts would do the same).

[5] Rombauer, *supra* at 228.

BACKGROUND

Our nation's men and women in uniform have been at war in one theater or another for over 25 years.[6] During that time, progress in battlefield medicine, advances in medical technology, and rapid transportation have made it more possible than ever to save those wounded in the line of duty.[7] But progress comes with a price. "Saving lives means that more soldiers are surviving with catastrophic injuries."[8] Thus, our nation has the largest ever returning group of veterans with severe disabilities.[9]

Since 1990, there has been a 46% increase in disabled veterans, placing the total number of veterans with service-connected disabilities above 3.3 million as of 2011.[10] By 2014, the number of veterans with a

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[6] Trauschweizer, 32 INTERNATIONAL BIBLIOGRAPHY OF MILITARY HISTORY 1 (2012), pp. 48-49 (describing intensity of military operations commencing in the 1990's culminating in full-scale military involvement in Iraq and Afghanistan.).

[7] Fazal, *Dead Wrong? Battle Deaths, Military Medicine, and Exaggerated Reports of War's Demise*, 39:1 INTERNATIONAL SECURITY 95 (2014), pp. 95-96, 107-113.

[8] Kriner & Shen, *Invisible Inequality: The Two Americas of Military Sacrifice*, 46 UNIV. OF MEMPHIS L. REV. 545, 570 (2016).

[9] *Id. See also* Waterstone, *supra* at 1082.

[10] VA, Trends in Veterans with a Service-Connected Disability: 1985 to 2011, Slide 4 at: http://www.va.gov/vetdata/docs/QuickFacts/SCD_trends_FINAL.pdf.

service-connected disability was 3.8 million.[11] As of March 22, 2016, the number of veterans receiving disability benefits has increased from 3.9 million to 4.5 million.[12]

Also since 1990, there has been a remarkable increase in veterans with disability ratings of 50 percent of higher, with approximately 900,000 in 2011.[13] That same year, 1.1 million of the 3.3 million total disabled veterans had a disability rating of 70 percent or higher.[14]

Finally, the disability numbers and ratings for younger veterans has markedly inclined. Conducting an adjusted data search, 570,400 out of 2,198,300 non-institutionalized civilian veterans aged 21 to 64 had a VA service-connected disability at 70 percent or higher in the United States in 2014.[15] Thus, half of the total number of veterans with a disability rating greater than 70 percent are between 21 and 64 years of age.

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11 *See* U.S. Census Bureau, Facts for Features at: http://www.census.gov/newsroom/facts-for-features/2015/cb15-ff23.html.

12 *Id. See also* VA, National Center for Veterans Analysis and Statistics, What's New at: https://www.va.gov/vetdata/veteran_population.asp.

13 VA Trends in Veterans with a Service-Connected Disability, supra, Slide 6.

14 *Id.*

15 *See* Erickson, W., Lee, C., von Schrader, S., *Disability Statistics from the American Community Survey (ACS)* (2017). Data retrieved from Cornell University Disability Statistics website: www.disabilitystatistics.org

The National Veterans Foundation found that over 2.5 million Marines, Sailors, Soldiers, Airmen and National Guardsmen served in Iraq and Afghanistan. Of those, nearly 6,600 were killed, and over 770,000 have filed disability claims.[16] Another study shows nearly 40,000 service members returning from Iraq and Afghanistan have suffered traumatic injuries, with over 300,000 at risk for PTSD or other psychiatric problems. These veterans face numerous post-deployment health concerns, sharing substantial burdens with their families.[17]

These staggering numbers are, in part, a reflection of the nature of wounds received in modern military operations. Physical injuries are understandably horrific.[18] However, many veterans also suffer severe psychological injuries attendant to witnessing the sudden arbitrariness and indiscretion of war's violence.[19] As one observer has stated: "assignments can shift rapidly from altruistic humanitarian work to the delivery of immense deadly force, leaving service members with confusing internal conflicts that are difficult to integrate. During deployment, even medical personnel are at times compelled to use

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16 *See* http://nvf.org/staggering-number-of-disabled-veterans/

17 Zeber, Noel, Pugh, Copeland & Parchman, *Family Perceptions of Post-Deployment Healthcare Needs of Iraq/Afghanistan Military Personnel*, 7(3) MENTAL HEALTH IN FAMILY MEDICINE 135-143 (2010).

18 Kriner & Shen, *Invisible Inequality*, supra.

19 Zeber, *supra* at n. 16.

deadly force to protect themselves, their patients, and their fellow soldiers.[20]

Combat-related post-traumatic stress symptoms (PTSS), with or without a diagnosis of post-traumatic stress disorder (PTSD) can negatively impact soldiers and their families. These conditions have been linked to increased domestic violence, divorce, and suicides.[21]

Such conditions are exacerbated when returning veterans must face stress in their families caused by their absence. Despite the amazing cohesion of the military community and the best efforts of the larger military family support network, separations and divorces are common. Families, already stretched by this extraordinary burden, are often pushed beyond their limits causing relationships to break down. Long deployments, the daily uncertainty of not knowing whether the family will ever be reunited, and the everyday travails of civilian life are difficult enough. A disability, coupled with mental and emotional scars brought on by wartime environments make the veteran's reintegration with his family even more challenging.[22]

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[20] *See generally*, Finley, *Fields of Combat: Understanding PTSD Among Veterans of Iraq and Afghanistan* (Cornell Univ. Press 2011).

[21] Melvin, *Couple Functioning and Posttraumatic Stress in Operation Iraqi Freedom and Operation Enduring Freedom–Veterans and Spouses*, available from PILOTS: PUBLISHED INTERNATIONAL LITERATURE ON TRAUMATIC STRESS. (914613931; 93193). *See also* Schwab, et al., War and the Family, 11(2) Stress Medicine 131-137 (1995).

[22] Finley, *supra*.

Rapid transition from the theater of war to the calm safety of a peaceful home environment creates existential conflicts over the meaning of deployments and future life in society. Protective vigilance and rapid response to threats in combat are maladjusted to life in a peaceful society. Moreover, a longing for reunion with family is tied to fear of reintegration into a life that now seems too foreign to contemplate. Many veterans resort to alcohol or other substances to dull the anxiety. Unfortunately it is a transition that some veterans never successfully navigate.[23]

The struggles do not stop here. Notably, the disabled veterans' difficulty assimilating back into normal society starts almost immediately. To seek care, rehabilitation, therapy, and the necessary equipment to function as near as possible to a whole human being, the veteran must navigate through a bureaucratic labyrinth that would test the patience of even the calmest among us.[24] Stories of this morass coupled with the scandalous treatment and marginalization by the federal government of those most severely disabled, nearly foreclose reintegration into normal civilian life.[25] Even aside from the well-documented neglect veterans have received for nearly three decades, a health system that had been lulled into complacency by dealing only with chronic maintenance health care for aging veterans was suddenly

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23 Gerber, *Creating Group Identity: Disabled Veterans and American Government*, 23 MAGAZINE OF HISTORY, Issue 3, pp. 23-28 (July 2009).

24 Waterstone, *supra* at 1084.

25 *See* Finley, *supra*; Waterstone, *supra*.

flooded with new patients facing severe and widely varying physical and mental injuries.[26]

In addition to all of this consider the circumstances a disabled veteran suffering from PTSD confronts when faced with divorce. It is no secret that divorce numbers among returning veterans is high.[27] As a rule, state court judges, friend of the court agencies, and opposing lawyers seeking to divide the marital estate and award custody and control of minor children favor the more stable (both physically and mentally) of the two parties. This cold analysis results in the inevitability that the veteran suffering from such conditions will be further alienated.

Then, consider that the 70 percent rating in greater than half of the disabled veterans returning from the last 30 years of the war often prevents them from working a full-time job. Even if they are not physically disabled, those with PTSS and PTSD are still highly prone to being unemployable.[28]

Ultimately, a state court with ostensible authority to divide (either directly or indirectly) the veteran's disability benefits and award them to a former spouse is taking that veteran's only source of income. This,

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[26] Finley, *supra.*

[27] DeBaun, *The Effects of Combat Exposure on the Military Divorce Rate*, Naval Postgraduate School, California (March 2012) (finding divorce rates since at least 2001 divorce rates among all branches of service had increase (with a greater percentage of those veterans being women) and concluding combat exposure (weapons usage and casualty experience) had an even greater effect on the increasing percentages)).

[28] Finley, *supra.*

despite the fact Congress designates these funds for the exclusive use and benefit of the veteran,[29] and has made a legislative determination in both the awarding of such benefits and in the disability rating upon which they are based, the latter of which is supposed to explicitly supplement the veterans' inability to compete or otherwise perform in the regular civilian job market.[30]

Veterans who suffer from service-connected disabilities are entitled to receive separate disability benefits.[31] The VA calculates their amount based on a scale, expressed in percentages, reflecting "the average impairments of earning capacity resulting from such injuries in civil occupations."[32]

The result is a harsh reality. Despite the law, state courts are forcing veterans to use their non-disposable disability pay to supplement the loss to their former spouse because the veteran exercised his or her statutory right to waive disposable pay to

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29 *See* 38 U.S.C. § 5301. This provision's absolute prohibition of legal process against servicemembers to force them to part with VA authorized and paid disability benefits admits of no exception in the context of marital property divisions.

30 Eligibility for disability pay is based on having a permanent and stable disability rated at 30% or more by the Department of Defense (DOD). 10 U.S.C. § 1201(b)(3)(B); Kamarck, *supra*.

31 See, *e.g.*, 38 U.S.C. §§ 1110 and 1131 and 10 U.S.C. § 1413a (the latter are the benefits at issue in *Merrill v. Merrill*, Case No. 15-1139).

32 38 U.S.C. § 1155. *See also* Kamarck, *Military Retirement: Background and Recent Developments*, Congressional Research Service (September 12, 2016), p. 9, available at https://www.fas.org/sgp/crs/misc/RL34751.pdf.

receive non-disposable pay. The Arizona Supreme Court, as with those other state courts noted by Petitioner, have been allowed to directly affect the veterans' receipt of his retirement and disability pay by ordering offsetting awards upon a waiver of disposable retired pay. A soldier whose only source of income may be such disability benefits, who cannot work, and therefore cannot support himself or his family without these benefits, is now being forced to pay this money over to his or her former spouse without regard or concern for his or her circumstances.

THE LAW

Summary. This section of the brief explores the meaning of the Military Powers Clauses[33] under Article I, § 8 of the Constitution, particularly, clauses 11 through 13, and connects these enumerated and federally reserved powers to the provision by Congress of veterans' benefits. The history of such benefit programs is also briefly addressed, as well as their purpose and intent. Finally, it is demonstrated that

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33 *See* Hartzman, *Congressional Control of the Military in a Multilateral Context: A Constitutional Analysis of Congress's Power to Restrict the President's Authority to Place United States Armed Forces Under Foreign Commanders in United Nations Peace Operations*, 162 MIL. L. REV. 50, 54 (1999) (stating while cases often refer to "war powers," when discussing military matters falling outside the domain of "war", it is analytically more accurate to speak in terms of "military powers," that is, the power to establish and maintain, govern and regulate, and use military forces, of which the "war power" is only one aspect.)

in all areas where a state court order might come into conflict with these benefit authorizations, the constitutional mandate given to Congress prevails–state courts simply do not have authority to deviate from the strictures of these provisions.

In this latter regard, pre-*McCarty* preemption in this area was never abrogated by the USFSPA. State court judges and commentators who have carelessly stated this have ignored over a century of this Court's jurisprudence on the subject. In addition to being morally unsupportable, providing carte blanche to state courts to dispose of veterans' benefits in this matter is legally unsustainable. A careful and measured examination of this Court's cases addressing the disposition of these benefits and the constitutional framework within which they exist evidences but this singular conclusion.

An historical overview. Veterans' benefits legislation (and therefore recognition of such benefits) preceded other social welfare measures in the United States by more than a century and have continued unabated.[34] The First Congress in 1776 provided for monthly payments up to half pay for officers, soldiers and seaman disabled in the line of duty.[35]

In 1789, under the new Constitution, Congress provided for continuance of these payments to disabled veterans for service-connected disabilities incurred in

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34 *See* Rombauer, *Marital Status and Eligibility for Federal Statutory Income Benefits: A Historical Survey*, 52 WASH. L. REV. 227, 228 (1977).

35 *Id.* at 228-29, citing Resolution of August 26, 1 J. OF CONG. 454 (1776).

the Revolutionary War.[36] "Monthly payments to veterans for service-connected disabilities have since been provided for veterans of all our country's wars and conflicts as well as for veterans with peacetime service."[37]

Service-related retirement and pension benefits without regard to disability or service-related impairments were later recognized in 1818.[38] Thus began the tradition of providing for veterans, and their survivors, for length of service and need, old-age, or non-service-related disability, or death.[39]

The constitutional framework. The Constitution provides "[a]ll legislative powers herein granted shall be vested in a Congress . . . ." U.S. Const., Art. I, § 1. Congress is vested with "large discretion as to the means that may be employed in executing a given power." *Lottery Case*, 188 U.S. 321, 355 (1903).

These "granted" or "enumerated" powers "by definition . . . are not powers that the Constitution 'reserved to the States'", and in fact, the Tenth Amendment 'expressly disclaims any reservation of that power to the States.'" *U.S. v. Comstock*, 560 U.S. 126, 144 (2010), quoting *New York v. United States*, 505 U.S. 144, 155 (1992).

Where Congress passes legislation within its enumerated powers under the Constitution this Court

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[36] Act of Sept. 29, 1789, ch. 24, 1 Stat. 95.

[37] Rombauer, *supra* at 229.

[38] Act of Mar. 18, 1818, ch. 19, § 1, 3 Stat. 410.

[39] Rombauer, *supra*.

is concerned only "with the bounds of legal power and not with the bounds of wisdom in its exercise by Congress." *Polish Nat. Alliance of United States v. NLRB*, 322 U.S. 643, 650 (1944).

In the very context of Congress' power to both grant, and to divide, veterans' retirement and disability benefits under the various federal veterans' benefits statutes and, particularly, the USFSPA, this Court echoed the aforementioned principle in *Mansell*. *Mansell*, 490 U.S. at 490 U.S. at 588-592, stating "Congress is not required to build a record in the legislative history to defend its policy choices."

The Military Powers Clauses. Among the enumerated powers given to Congress in Article I are the Military Powers Clauses, clauses 11 through 13, inter alia.[40]

"[I]t is the primary business of armies and navies to fight or be ready to fight wars should the occasion arise." *Toth v. Quarles*, 350 U.S. 11, 17 (1955). *See also Orloff v. Willoughby*, 345 U.S. 83 (1953). This responsibility rests exclusively with Congress and the President. *Rostker v. Goldberg*, 453 U.S. 57, 70-71 (1981).

Congress' power in this area "is broad and sweeping." *United States v. O'Brien*, 391 U.S. 367, 377 (1968). No state authority will be assumed in general matters of the common defense, unless Congress itself cedes such authority, or exceeds its constitutional limitations in exercising it. *Rumsfeld*

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40 "The Congress shall have the power . . . [t]o raise and support Armies . . . ; [t]o provide and maintain a Navy;" and "[t]o make Rules for the Government and Regulation of the land and naval forces."

v. Forum for Acad. & Inst'l Rights, Inc., 547 U.S. 47, 58 (2006).

Exercise by Congress of the Military Powers has been upheld against state authority in a variety of contexts. The Military Powers Clauses have been held to vest Congress with authority to pass legislation providing veterans with a multitude of direct benefits, including wages, bonuses, education, retirement, disability and special compensation, as well as indirect benefits or protections, such as from federal or state taxation, employment discrimination,[41] and financial harassment and hardship.

Such legislation is within Congress' power to raise and support armies under Article I, § 8, of Constitution. *Johnson v. Robison*, 415 U.S. 361 (1974). Thus, retirement programs are enacted pursuant to Congress' power to raise and maintain armies and the navy and where a state statute conflicts with a federal statute implementing such a program, federal legislation must prevail. *Cantwell v. County of San Mateo*, 631 F.2d 631 (1980), cert. den. 450 U.S. 998 (1981).

As they relate to this case, the Military Powers Clauses serve as Congress' enumerated power to provide veterans with retirement and disability benefits. The Supreme Court has repeatedly and

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[41] 38 U.S.C. § 4301. The Uniformed Services Employment and Reemployment Rights Act (USERRA) was passed to incentivize non-career military service in the active duty and reserve components. *See also* Harner, The Soldier and the State, *supra* at 93 (tracing Congressional efforts in this regard since the 1940's and explaining Congressional authority to do this under the War Powers Clauses).

consistently explained that Congressional power and authority under the Military Powers Clauses includes "enhancing military service and aiding the readjustment of military personnel to civilian life." *Johnson, supra* at 385. "Legislation to further these objectives is plainly within Congress' Art. I, § 8, power 'to raise and support Armies.'" *Id.* at 376.

Indeed, full power of legislation in these matters lies with Congress. *Street v. United States*, 133 U.S. 299, 307 (1890). *See also Tarble's Case*, 80 U.S. 397 (1872) (noting the constitutional allocation of powers in this realm gave rise to a presumption that federal control over the armed forces is exclusive). This presumption overrides any presumptions of implied state authority over matters of marital property divisions in state court divorce proceedings where such proceedings involved partition of veterans' retirement and disability benefits.

The Necessary and Proper Clause. Congress' Article I, § 8 "enumerated" powers under the Armed Forces Clauses to provide military veterans with these protections are shored up by the Necessary and Proper Clause. This clause "expresses clearly the thoughts that the life of the Nation and of the States and the liberties and welfare of their Citizens are to be preserved and that they are to have the protection of the armed forces raised and maintained by the United States with power in Congress to pass all necessary and proper laws to raise, maintain, and govern such forces." *Dunne v. United States*, 138 F.2d 137, 140 (8th Cir. 1943).

The Supremacy Clause. Finally, the Supremacy Clause leaves no doubt that all laws enacted by

Congress in the direct exercise of its Military Powers are the supreme law of the land and cannot be ignored or circumvented by state courts. Article VI, § 2. No state constitution, statute, or judicial decision can contravene the supremacy of Congress' authority in exercising its enumerated constitutional powers. *Id.*

> The decisions of the state courts of last resort . . . are not conclusive upon the interpretation of the federal constitution. The supreme court of the United States is, however, the final expositor and arbiter of all disputed questions touching the scope and meaning of that sacred instrument, and its decisions thereon are binding upon all courts, both state and federal.

Mugler v. Kansas, 123 U.S. 623 (1887).

Therefore, any state judicial decision, "however clearly within a State's acknowledged power, which interferes with or is contrary to federal law, must yield." *Gibbons v. Ogden*, 9 Wheat. 1 (1824) (emphasis added).

This Court has stated this principle "is but a necessary consequence of the Supremacy Clause." *Ridgway v. Ridgway*, 454 U.S. 46, 55 (1981) (citing *McCarty*, *supra* and *Hisquierdo v. Hisquierdo*, 439 U.S. 572 (1979) and stating "a state divorce decree, like other law governing the economic aspects of domestic relations, must give way to clearly conflicting federal enactments." Therefore, "[t]he relative importance to the State of its own law is not material when there is a conflict with a valid federal law, for the Framers of the Constitution provided that federal law must prevail." *Ridgway*, *supra* at 54-55 (emphasis

added), citing *Free v. Bland*, 369 U.S. 663, 666 (1962) and *Gibbons v. Ogden*, 9 Wheat 1 (1824).

Exercise by Congress of its enumerated Military Powers is plenary and exclusive of the States' authority. As this Court stated in *Tarble's Case*, 80 U.S. 397, 408 (1871):

> The execution of these powers falls within the line of [Congress'] duties; and its control over the subject is plenary and exclusive. It can determine, without question from any State authority, how the armies shall be raised, whether by voluntary enlistment or forced draft, the age at which the soldier shall be received, and the period for which he shall be taken, the compensation he shall be allowed, and the service to which he shall be assigned. And it can provide the rules for the government and regulation of the forces after they are raised, define what shall constitute military offences, and prescribe their punishment. No interference with the execution of this power of the National government in the formation, organization, and government of its armies by any State officials could be permitted without greatly impairing the efficiency, if it did not utterly destroy, this branch of the public service.

In re Tarble, 80 U.S. 397, 408 (1871).

In the very context of the exercise by Congress of its enumerated Military Powers in blocking a state court from imposing a "constructive trust" on federal statutory life insurance benefits for a military member's spouse, this Court has stated to the extent a

state court "fails to honor federal rights and duties", it will not hesitate to protect under the Supremacy Clause, rights and expectancies established by federal law against the operation of state law, or to prevent the frustration and erosion of the congressional policy embodied in these rights and expectancies." *Ridgway, supra* at 54 (emphasis added), citing *McCarty, supra.* Therefore, in every case where federal law controls, "state divorce decrees, like other law governing the economic aspects of domestic relations, must give way to clearly conflicting federal enactments." *Id.* at 55. "That principle is but the necessary consequence of the Supremacy Clause of our National Constitution." *Id.*

As one court stated of Congress' exercise of the Military Powers: "When the Federal government, in rewarding its soldiers, determines for itself how it will expend the Federal money, and declares that this money shall be protected against transfer or diminution from any quarter, its power under the express terms of the U.S. constitution is exclusive." *Atlanta v. Stokes*, 175 Ga. 201, 212 (1932) (emphasis added). In describing the supremacy of statutes enacted by Congress under the Military Powers clauses, this Court continued:

> Congress had the supreme right to say (without let or hindrance of any kind from any quarter) upon what terms it would reward faithful service in time of war as an instrument for the continuance of like faithful service if the need of the future should demand . . . . To maintain the power to wage war, it is as much essential to the

> morale of the troops of a government that those who face death upon the field of Mars should have the right to anticipate rewards in the future (especially if they have been victorious) as to expect that they will receive the monthly compensation for service, which must be meager indeed in instances when their lives are actually exposed to danger. It seems strange, in view of the long line of decisions on this subject, that any one can suppose, even though the power of a State to tax generally is supreme, that power may be used to hamper, hinder, annoy, harass, and impede the Federal government in the exercise of its unlimited power to carry on war . . . .

Id. at 204-205 (emphasis added).

Deference to Congress' enumerated Military Powers is at its "apogee" when interpreting statutes passed thereunder. *Rostker v. Goldberg*, 453 U.S. 57, 70 (1981). The Constitution granted the judiciary "no influence over either the sword or the purse."[42] Thus, courts have long recognized that Congressional acts under the authority of the Military Powers Clauses are "qualitatively different" than those passed pursuant to its other powers.[43] These emoluments of service

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[42] O'Connor, *The Origins and Application of the Military Deference Doctrine*, 35 GA. L. REV. 161, 166-67 (2000), quoting Hamilton, THE FEDERALIST, No. 78 at 465 (Rossiter ed., 1961).

[43] Harner, *The Soldier and the State: Whether Abrogation of State Sovereign Immunity in USERRA Enforcement Action is a Valid Exercise of the Congressional War Powers*, 195 MIL. L. REV. 91, 112 (2008).

are granted under a power regarded by this Court as nearly always superior to the rights of the states and its individual citizens.[44]

When Congress exercises such power, it is "complete to the extent of its exertion and dominant."[45] First uttered in defense of the exercise by Congress of the War Powers over the institution of slavery, John Quincy Adams stated: "This power is tremendous; it is strictly constitutional; but it breaks down every barrier so anxiously erected for the protection of liberty, property and of life."[46]

Even where legislation in this sphere may raise constitutional issues Congress has been given great latitude. *Parker v. Levy*, 417 U.S. 733 (1974).

This of course includes barriers erected by state courts dispossessing the veterans of funds that were specifically authorized and provided for under these Military Powers. *See McCarty*, *supra*; *Mansell*, *supra*; *Hisquierdo*, *supra*. Therefore, in the premises of Congressional authority over matters relating to the armed forces, the Constitution leaves no discretion to the states.

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[44] *Id.*, citing *Tarble's Case*, 80 U.S. 397, 401-402 (1872) (state courts have no authority to release soldiers from active duty).

[45] *Id.* at 146.

[46] Reed, et al., *Modern Eloquence*, POLITICAL ORATORY (vol. IX, 1903), p. 17 (taken from speech of the Hon. J.Q. Adams in the House of Representatives, on the State of the Union, May 25, 1836).

ARGUMENT

Amici has provided the Court with the background and plight of disabled veterans facing reintegration into society and the negative effects of state court orders dispossessing them of what is often their only source of income and sustenance. Amici has also sought to demonstrate Congress possesses plenary authority to make laws under its Article I Military Powers, and this includes legislation providing veterans with a wide-range of financial benefits and protections, including the retirement and disability benefits at issue in this case, and in the functionally identical case of *Merrill v. Merrill*, Case No. 15-1139.

As Petitioner concludes, federal law preempts state law over these benefits. The USFSPA's singular exception allows state courts to exercise authority over only "disposable" retired pay. *See* 10 U.S.C. § 1408(a)(4)(B) and (c)(1). "Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent." *Andrus v. Glover Constr. Co.*, 446 U.S. 608, 616–617 (1980). This principle nullifies any attempt by state courts to order division of any other non-disposable benefits not included with the only exception to pre-existing pre-emption–that portion of disposable retired pay that may be divided.

While state courts have continued to assert authority over these benefits when considering marital property settlements in divorce proceedings in the

decades that followed passage of the USFSPA, this Court's decision in *Mansell* properly recognized that federal preemption had preceded *McCarty*, and continued to prevail, but for that limited exception in the USFSPA. *Mansell, supra* at 589-92.

McCarty and *Mansell* simply confirmed over a century of federal preemption over state authority of its domestic law with respect to veterans' benefits in the division of marital property upon divorce. In *McCarty*, this Court reasoned regardless of how a state court characterized such benefits (*e.g.*, as earnings deferred during the marriage and therefore ostensibly part of the marital estate), all military retirement and disability benefits were off limits to state courts. The Court explained simply that application of state marital property law conflicts with the federal military retirement scheme. *McCarty, supra* at 223 and n. 16. Thus, Congress' authority to provide veterans with these benefits preempted state court authority to distribute them in a manner other than as directed by Congress.

Mansell's straightforward interpretation of the USFSPA acknowledged the continuing vitality of federal preemption. The Mansell Court ruled (1) *McCarty* had not been abrogated by the USFSPA, *Mansell, supra* 490 U.S. at 588-592; (2) the USFSPA applied directly to prohibit state courts from dividing retired pay waived to receive disability pay, *id.* at 589-90; and (3) state courts could not do "indirectly" what they could not do directly–they are prohibited to "treat" or "consider" all non-disposable benefits in the distribution of the marital estate. *Id.*

However, as evidenced by the state court's disposition of this case and *Merrill v. Merrill*, Case No. 15-1139, as well as countless other state court cases throughout the country, nearly another three decades (the worst three decades for returning wounded and disabled veterans), have passed in which states continue to blatantly ignore Congress' absolute authority over these benefits, and, in doing so, disregard the plight of their designated beneficiaries–the retired and disabled veteran.

In the years following passage of the USFSPA, misinformed or uninterested state courts developed the illusion that, pre-*McCarty*, they had been given some historical right to treat veterans' retirement and disability pay as part of the marital estate. The state courts that advance this uninformed rationale cite to state court cases between the mid-1960's and the 1981 decision in *McCarty*.

Of course, if one fails to appreciate these decisions were themselves an unauthorized renouncement of the historically established jurisprudence, which had existed at least since *United States v. Tyler*, 105 U.S. 244 (1882), then they can be blindly cited for the proposition. However, these cases cannot erase the history of Congress' preemptive authority over distribution and disposition of veterans' benefits. This Court has itself recognized the "imposing number of cases" in which this principle has prevailed, including those involving divorce and distribution of marital property. *Rostker*, *supra* at 70, citing *Tyler*, *supra* and *McCarty*, *supra*. *See also Ridgway*, *supra*.

There simply was no "abrogation" of *McCarty* in the USFSPA, and there was no preexisting state

authority over treatment of military benefits in matters of domestic law. It is a fiction. And, as the Court stated in *Rostker*, *supra* at 68-69, the absolute preemption of federal law in the area of military powers admits of no "facile degrees" of judicial deference. It would be "blinking reality" to conclude otherwise. *Id.*

Second, *McCarty* is not some jurisprudential island that mystically appeared after some seismic event in the field of law on the subject. That Congress had these plenary powers, and that the funds, benefits, and measures derived therefrom were for the exclusive use of the veterans in furtherance of Congress' Military Powers had been settled for years prior to *McCarty*. Remarkably, state courts continued to propagate this illusion even after *Mansell*.

Marital property is also different in a legal sense. The principles of "marital" or "community" property "rests upon something more than the moral obligation of supporting spouse and children: the business relationship of man and wife for their mutual monetary profit." *Wissner v. Wissner*, 338 U.S. 655, 660 (1950). The Court continued: "Venerable and worthy as this community is, it is not, we think, as likely to justify an exception to the congressional language as specific judicial recognition of particular needs, in the alimony and support cases." *Id.* Nonetheless, while less important to the states than alimony and child support, a marital property distribution is considerably more damaging to the long-term well-being of the veteran. Such awards ordinarily may not terminate upon a certain date or upon a

change of circumstances as with child support and spousal support awards, respectively.

With all due respect to the current Solicitor General's position, it follows from what has been stated above that military spouses never had a legitimate vested interest in a veteran's retirement or disability pay under the law of any state before or after *McCarty*. *See* SG Brief on Petition as Amicus Curiae, pp. 7-8.

Finally, *McCarty* and *Mansell* rejected the notion that offsetting awards, indemnity agreements, or any other number of creative solutions could allow substitution for the former spouse's loss due to the veteran's waiver without running afoul of the USFSPA's and *Mansell's* confirmed restrictions on allowing division of anything other than "disposable" retired pay.

To continuously repeat the vacuous rationale that the state court has authority to issue an equalizing order as long it does not expressly state that the veteran's payments to his or her former spouse are to come out of his retirement or disability pay is as absurd as it is nonsensical. The money has to come from some source. While it may be the case that some retired and disabled veterans have the financial resources to "make up" the reduction suffered by the former spouse when they exercise their statutory right to waive retirement pay, it is definitely the case that over half the veterans returning from war during the last 30 years are greater than 70 percent disabled. As noted, this also means that, in many cases, these veterans are unable to attain or sustain regular employment. The disability benefits are directly purposed for that inability. To order that the veteran

replace what was taken from the former spouse by operation of a law designed to exclusively support the veteran with whatever means he or she has is more often than not the same as exerting prohibited authority over those funds.[47]

Turning a blind eye to the economic realities and the real plight of the veteran by simply ignoring it and ordering the veteran to pay no matter where he or she gets the money is a mockery of Congress' authority, the Supremacy Clause, this Court's jurisprudence, and most of all the disabled veteran who sacrificed his or her capacities in the service of this country and, as a result of that sacrifice, now has no other source of sustenance.

As Petitioner states, this must also be prohibited. If it were otherwise, then the state courts could circumvent the federal law by crafting provisions that require the veteran to "make up" the reduction from whatever funds he or she has, regardless of his or her financial circumstances. This is exactly what is happening.

It is now time for this Court to stop state courts from doing indirectly what they are forbidden from doing directly, to wit, consider any "non-disposable" veterans' benefits as divisible marital property consequent to divorce. As one commentator has noted, "[i]t is somewhat unexplainable that personnel involved in the single most significant, exclusive, and unique federal undertaking (*i.e.*, maintenance of a national military force) have been left to the whims of fifty different judicial systems without any concern

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[47] Kirchner, 43 FAMILY LAW QUARTERLY 3 (Fall 2009), p. 373.

for consistency in treatment of military personnel or interpretation of federal law from state to state."[48]

Finally, because this is a marital property distribution, 38 U.S.C. § 5301 independently protects the benefits at issue in this case and in *Merrill v. Merrill*, Case No. 15-1139, as a matter of jurisdiction. In *Rose v. Rose*, 481 U.S. 619, 631-32 (1987), the Court cited the case law from *Wissner v. Wissner*, 338 U.S. 655, 660 (1950) through *Ridgway*, *supra*, noting that where the issue regards a marital property disposition involving retirement or disability benefits, the state courts cannot impose constructive trusts (or other anticipatory mechanisms like indemnity agreements or set-off orders) because this would violate 38 U.S.C. § 770(g), "a prohibition identical . . . to § 3101" (the predecessor of 38 U.S.C. § 5301).

While as noted by the Solicitor General, SG Brief on Petition as Amicus Curiae, pp. 7-8, this issue is not before the Court, 38 U.S.C. § 5301 imposes a jurisdictional limitation against present and future dedication of non-disposable funds.

All this to say that a state court's authority over a distribution of marital property in a divorce proceeding, regardless of the honorable intent of the particular judge and the level of sanctity with which a state regards those rights within its domestic order, is necessarily of an inferior character when considered in contrast to the propriety of Congress' provisioning of the war weary and the combat wounded veteran with the basic necessities for a minimally comfortable future

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48 Kirchner, *supra* at 370 and n. 13.

after a full career of voluntary service to his or her country.

CONCLUSION

Article I of the Constitution has given Congress plenary authority to make all provisions for the supply, maintenance and welfare of the service men and women of the armed forces so that they may operate with the skill, dedication and concentration required in the most dangerous and unpredictable of environments. As explained in this brief, Congress has put in place the apparatus to protect our veterans both during and after their service to our country. These laws are based on perhaps the most powerful of those enumerated powers given to Congress by the Constitution, the Military Powers Clauses. Congress has been accorded no greater deference by this Court than in these premises.

Yet, the state court in the case sub judice as well as in *Merrill v. Merrill*, Case No. 15-1139, and courts in numerous other states in the nation continue to ignore this pillar of constitutional hierarchy.

In military terminology, "fire for effect" is the call to artillery battery units to release the full measure of their ammunition onto an established target. The technical process requires a forward observer (FO) to confirm a target's identity, situate its range, and verify its coordinate location. The FO then communicates this to the artillery units, which will then fire rounds to gauge their range and accu-

racy. Once the FO confirms the artillery has hit its mark, the call to "Fire for Effect" is then communicated to the artillery unit for the latter to release the full wrath of the artillery battery's ammunition onto a target to effectively neutralize it. Petitioner has now precisely identified these renegade state courts, their coordinates have been established, and they have been placed squarely within this Court's range. Amici as the FO for this operation and in this war against our veterans respectfully calls now to this Honorable Court, the artillery unit that it is relying on as truly the last line of defense against the continued onslaught of abuses by the several states against some of our nation's most vulnerable disabled combat veterans to execute its mission: FIRE FOR EFFECT.

In support of Petitioner, amici respectfully requests this Court to reverse the decision of the Arizona Supreme Court.

Respectfully submitted,

CARSON J. TUCKER
COUNSEL FOR AMICUS CURIAE
LAW OFFICES OF
CARSON J. TUCKER
117 N. FIRST ST., SUITE 111
ANN ARBOR, MI 48104
(734) 629-5870
CJTUCKER@LEXFORI.ORG

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